Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARCIA M. WITTER AND ABRAHAM NEE NTREH,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals failed to grant relief under Rule 60(b) when new evidence of Petitioners' marital status was available after the State Courts dismissed the aggravated perjury charge against Petitioner, Abraham Nee Ntreh?

2. Whether a federal agency, Immigration and Naturalization Service, can supersede state law when making administrative rulings in violation of Article X of the United States Constitution?

LIST OF PARTIES

ALL THE PARTIES ARE:

Marcia M. Witter, Petitioner

Abraham Nee Ntreh, Petitioner

Department of Justice, Immigration and Naturalization Service, Respondent

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the United States:

Marcia M. Witter and Abraham Nee Ntreh, Petitioners, petition the Court to issue a Writ of Certiorari to the Court of Appeals and to review an Order denying recall of mandate and for relief under Federal Rule of Civil Procedure Rule 60(b).

OPINION BELOW

An Order dated July 16, 1999, denying Petitioner's Motion to Recall the Mandate and for relief under Federal Rules of Civil Procedure, Rule 60(b), is reprinted in the appendix to this Petition ("App.") at 1a. The relief sought was from an opinion issued on May 30, 1997, reported at 113 F.3d 549, (C.A. 5, Tex., 1997), reprinted in the appendix to this Petition ("App.") at 2a. The appeal was from an order of the Immigration and Naturalization Service. An Immigration Judge had previously ruled in the Matter of: Marcia Witter and Abraham Nee Ntreh, Respondents, A42 395 049/A42 395 050, dated August 29, 1995, and is reprinted at "App." 9a.

JURISDICTION

The Order denying Petitioner's Request for Recall Mandate and Relief under Federal Rules of Civil Procedure, Rule 60(b), was entered on July 16, 1999. This

Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 60(b), provides as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or

to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the Court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Article [X], United States Constitution, provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Texas Family Code, Section 2.401, provides as follows:

Proof of Informal Marriage

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is

not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(c) A person under 18 years of age may not:

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

STATEMENT OF CASE

A. Statement of Facts

1. Petitioner, Marcia Witter, is a native of Jamaica and a citizen of the United Kingdom. Petitioner, Abraham Nee Ntreh, is a native and citizen of Ghana. Both entered the United States legally and were married in Dallas, Texas in August 1988. In May of 1989, Nee Ntreh filed a petition for annulment. Petitioner Witter signed a waiver of notice agreeing that the petition could be considered by the court without further notice to her. An annulment was granted setting aside the 1988 marriage.

On November 17, 1989, Petitioners were granted a visa to return to the United States. Petitioner Witter on her employment as a nurse, and Petitioner Nee Ntreh was admitted as her spouse and they so did on November 20, 1989. At the time of application of visa, they were husband and wife. In 1993, Petitioners petitioned the 303rd Judicial District Court of Dallas County, Texas. A Revocation of the Annulment was granted based upon the testimony of Petitioners that Petitioner, Abraham Nee Ntreh,

was not a participant of the hearing that originally annulled the marriage. The court granted revocation of the annulment on July 9, 1993. In subsequent Immigration and Naturalization Services proceedings on August 29, 1995, Petitioners are ordered deported on the basis that they were not married when they made their visa application, even though they both argued common-law marriage under the laws of the State of Texas. Petitioner Abraham Nee Ntreh was under indictment for aggravated perjury based upon his testimony at the revocation of annulment proceedings. Both parties were deported even though the criminal matter was pending. In violation of Supreme Court precedent, see *Woodby v. INS*, 385 US 276, 17 L. Ed. 362, 87 S. Ct. 483 (1966). Petitioner Ntreh was convicted of perjury and appealed his case. On the 25th day of February, 1999, the Court of Appeals for the Fifth District of Texas at Dallas reversed the trial court and found Petitioner, Abraham Nee Ntreh, acquitted of all perjury allegations. Appendix ("App.") 20a.

B. Statement of the Proceedings Below

Petitioners appealed the Immigration and Naturalization Service Judge's ruling to the Fifth Circuit Court of Appeals. The Court issued an opinion on May 30, 1997, reported at *Witter, et al. v. INS*, 113 F.3d 549 (C.A. 5, Tex., 1997), "App." 2a.

On May 26, 1999, acting pro se, Petitioners filed a Motion for Recall of Mandate with the Fifth Circuit based upon Rule 60(b) information being the acquittal of Petitioner Nee Ntreh. "App." 31a.

The Fifth Circuit Court of Appeals on July 16, 1999, denied Petitioners' motion. "App." 1a.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S RULING IN DENYING RULE 60(b) IS DIRECTLY IN CONFLICT WITH ALL OTHER CIRCUITS AND PRIOR PRECEDENT OF THE FIFTH CIRCUIT.

This case presents two unique questions for the Court to consider. The first and foremost question is that pursuant to Rule 60(b), the Federal Rules of Civil Procedure, the Fifth Circuit refused to reopen the case even when it was clear Petitioners had presented new evidence to them that had not existed before and would have made a material difference in the original order appealed to them. Immigration and Naturalization Service clearly placed strong weight on the fact that Petitioner Nee Ntreh had been indicted for aggravated perjury. The indictment for aggravated perjury tainted the Immigration Judge's opinion of the annulment process and eventual revocation of the annulment causing him to render an opinion that was prejudiced. The Courts have consistently ruled that deportation hearings are to be based on clear, irrevocable and convincing evidence, *In Re Amaya-Castro*, Interim Decision (BIA) 3329 (August 23, 1996). Immigration Law Judge's decision was set aside because the facts were not clear, irrevocable and convincing. Additionally, in *In Re A-P*, Interim Decision (BIA) 3375 (January 26, 1999), the Courts ruled that the decision of

the Immigration Judge be set aside because the facts did not support the Immigration Naturalization Act for deportation. Additionally, in the *Matter of Rocha*, 20 I&N Dec. 944 (BIA 1995), a deportation proceeding based upon an indictment but not a conviction was terminated because the evidence did not show a conviction.

In *Corex Corp v. U.S.*, 638 F.2d 119, (C.A. 9, Cal.,1981), the Court ruled that newly discovered evidence is an integral part of Rule 60(b). Also see *U.S. Fidelity & Guaranty Co. v. Lawrenson*, 334 F.2d 464 (C.A. 4, Md., 1964), cert. denied, 85 S. Ct. 141, 379 U.S. 869, 13 L. Ed. 2d 71.

In *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525 (C.A. 8, Mo., 1996), the Court ruled that there were four grounds of newly discovered evidence that were important. First, that the evidence was discovered after the relevant hearing. In the case at bar, it is issuance of mandate by the Fifth Circuit. Secondly, the moving party in this case, Petitioners, exercised due diligence to discover the evidence. By the examination of the date of the reversal and Motion to the Circuit, it is apparent due diligence by the Petitioners cannot be denied. Third, evidence is material and not impeachable. The reversal of a conviction for aggravated perjury does, in fact, meet this criteria. Finally, the new hearing would consider evidence that would probably produce a different result in the final outcome. This is unquestionable, in light of the fact that the aggravated perjury charge stems from the revocation of annulment hearing which was the ultimate question on whether the parties were married in formal ceremonies in the State of Texas.

The ruling by the Fifth Circuit Court of Appeals is contrary to the rule in all other circuits and in fact is contrary to the ruling in *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (C.A. 5, Tex., 1980), rendered earlier by the Fifth Circuit. The action by the Fifth Circuit panel in this case creates a dangerous conflict in the Circuit that had at one time been uniform and consistent but now leaves doubt. *U.S. v. Walus*, 616 F.2d 283 (C.A. 7, Ill., 1980).

II.

THE ACTION BY IMMIGRATION AND NATURALIZATION SERVICE SUPERSEDES STATE LAW IN VIOLATION OF ARTICLE X OF THE UNITED STATES CONSTITUTION.

Decisions of the Fifth Circuit Court of Appeal to deny the common-law marriage status to Petitioners is a violation of Article X of the United States Constitution and usurps the authority of the State of Texas to make rules governing common-law marriage.

Article X of the United States Constitution clearly sets out the principle and premise that unless the Constitution gives the United States Government powers, the powers are reserved to the people of the state. In this case, the right to set the law and rules governing common-law marriages are clearly within the parameter of the State of Texas. In Texas Family Code Section 2.401, which is a 1997 recodification of previous Texas law (formally cited as V.T.C.A. Family Code Sec. 1.91), the institution of informal marriage is recognized in the State of Texas. Marriage must be between a man and woman, they may declare their marriage, or they may agree to be

married, live together as husband and wife, in reverence to others that are married. Under Texas law, they are not required to meet all three elements simultaneously. In *Flores v. Flores*, 847 SW 2d 648 (Tex. Civ. App. 10th District, 1993), rehearing denied, writ denied. The courts ruled that the three elements may occur at different times until all three elements exist. The Petitioners held themselves out as husband and wife in Texas before and after their annulment proceeding and before and after their revocation of annulment, clearly they were married in the eyes of the laws of the State of Texas. The Immigration Law Judge should have recognized this marriage. In doing so, he violated the rights of the individuals pursuant to Article X of the United States Constitution in that he usurped unto the federal government something that is clearly within the parameters of the authority of the state.

In *Hendrix v. United States Immigration and Naturalization Service*, 583 F.2d 1102 (C.A. 9, 1978), the Court stated, "The purpose of the sham marriage doctrine, however, is to avoid manipulation of the immigration priorities through changes in marital status not undertaken in good faith." It is clear from the limited amount of evidence presented in the record that although the Witter-Nee Ntreh marriage was shaky at best, it was still a marriage pursuant to Texas law, and it was not something that was done merely to produce the desired effect with the Immigration and Naturalization Service. Texas law clearly allows and has recognized common-law marriages to the exclusion of other Texas law in *Texas Employment Insurance Agency v. Borum*, 834 SW 2d 395 (Tex. Civ. App. 4th District, 1992), writ denied. The Court recognized the

validity of a common law marriage to the point that it set aside the widow's death benefit under the Texas Worker's Compensation Act. The State of Texas recognizes spousal privilege, in *Weaver v. State*, 855 SW 2d 116 (App. 14th District 1993), being established by common law marriage. As far back as 1939, the Texas Courts have recognized that common law marriage is an agreement between a man and a woman both competent to marry, holding themselves out as husband and wife and who live together, see *Bell v. State*, 129 SW 2d 664 (Cr. App., 1939).

Article X of the United States Constitution prohibits the Federal Government from usurping authority. The Fifth Circuit Court of Appeals in 1984, *State of Texas v. U.S.*, 735 F.2d 339 (C.A. 5, Tex., 1984), cert. denied, 105 S. Ct. 267, 469 U.S. 892, 83 L. Ed. 2d 203, ruled that regardless of whether Congress acts in a politically accountable manner, Courts must be prepared to intervene to protect the essential roles of the states in Federal systems and Courts should not abdicate to Congress when it allows powers between national and state levels of government. Such allocation threatens the operations of powers inherent in the federal design. Also see, *Davis v. Boston and M R Company*, 89 F.2d 369 (C.C.A. 1 Mass. 1937).

The Federal design was for the states to control the status of a marriage within a state. See, *U.S. v. White*, 545 F.2d 1129 (C.A. 8 Ark., 1976). The Court clearly pointed out that it had been long recognized that the states have the absolute right to prescribe conditions upon which marriage relation between its own citizens can be created and the basis for its dissolution.

Additionally, in *Anetekhai v. U.S. INS*, 685 F. Supp. 599 (Eastern District Louisiana 1988), affirmed, 876 F.2d 1218, the Federal Courts have recognized the right of the state to make laws governing marriage dissolution.

The Court in *A.L.A. Schechter Poultry Corporation v. U.S.*, 55 S. Ct. 837, 295 U.S. 495, 79 L. Ed. 1570 (1935), clearly points out a doctrine under Article X of the United States Constitution that is as clear today as it was in 1935; that extraordinary conditions do not create or enlarge constitutional powers and cannot justify actions by the federal government which lies outside the sphere of constitutional authority.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted,

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APPENDICES

Marcia M WITTER; Abraham Nee Ntreh,
Petitioners,

v.

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

No. 96-60335
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

May 30, 1997.

Brian K. Bates, Quan, Burdette & Perez, Houston, TX, for Petitioners.

Mark C. Walters, Department of Justice, Immigration Litigation, Washington, DC, Charles Ernst Pazar, United States Department of Justice, Civil Division, Washington, DC, Janet Reno, Office of the United States Attorney General, Civil Division, Appellate Staff, Washington, DC, Robert L. Bombough, Director, Office of Immigration Litigation, Civil Division, Washington, DC, John B.Z. Caplinger, Director, Immigration and Naturalization Service, New Orleans, LA, Arthur Strapp, District Director, Immigration and Naturalization, Dallas, TX, for Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

Before DAVIS, EMILIO M. GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Marcia M. Witter and Abraham Nee Ntreh seek review of a final order of the Board of Immigration Appeals ("BIA" or "Board") finding them deportable under § 241(a)(1)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(1)(A). We affirm.

I

Witter is a native of Jamaica and citizen of the United Kingdom. Abraham Nee Ntreh is a native and citizen of Ghana. Both entered the United States legally and were married in Dallas, Texas in August 1988. In May 1989, Nee Ntreh filed a petition for annulment alleging that Witter had fraudulently induced him to marry her, that the couple had never lived together, and that they had never consummated the marriage. Witter signed a waiver of notice in which she swore that she read and understood the annulment petition and agreed that the petition could be considered by the court without further notice to her. A transcript of the hearing indicates that Nee Ntreh appeared and testified at the proceeding. The court granted the annulment and sent a copy of the order to Witter at the address provided in the waiver. Witter's apartment number was omitted from the address to which the order was sent.

While in London five months later, Petitioners applied for new immigrant visas with the American embassy, representing that they were married and presenting their 1988 marriage certificate as evidence. Witter received a preference for entry based on her employment as a nurse at Parkland Hospital in Dallas. Nee Ntreh's application was granted because he was Witter's spouse.

Petitioners made no mention of the annulment in their visa applications.

In June 1993, the Immigration and Naturalization Service ("INS") issued show cause orders against Witter and Nee Ntreh alleging that they were deportable under INA § 241(a)(1)(A) for having willfully misrepresented a material fact in order to obtain Nee Ntreh's visa under INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).[1] The INS later filed additional charges against Witter, alleging that she was excludable under INA § 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i), for alien smuggling.[2] In addition, the

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[1] INA § 212(a)(6)(C)(i) states: "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable." In 1990, Congress amended the INA, redesignating INA § 212(a)(19) as § 212(a)(6)(C)(i), codified at 8 U.S.C. § 1182(a)(6)(C)(i). The amendment, however, applies only to individuals entering the United States on or after June 1, 1991. Because Petitioners entered the United States in 1989, the show cause orders should have charged excludability under § 212(a)(19). However, the Board found that Petitioners never objected to the designation and that they suffered no prejudice from the error, since the language of INA § 212(a)(19) and amended § 212(a)(6)(C)(i) are identical in all relevant respects. All subsequent references in this opinion will be to INA § 212(a)(19).

[2] INA § 212(a)(6)(E)(i) states: "Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is excludable."

INS charged Nee Ntreh with marriage fraud under INA § 241(a)(1)(G)(ii), 8 U.S.C. § 1251(a)(1)(G)(ii).[3]

At that time, Petitioners filed a petition in Texas state court seeking to set aside the 1989 annulment order. Petitioners alleged that they never intended to complete the annulment and only recently discovered that an order annulling their marriage had been issued. Nee Ntreh testified that he did not attend the original annulment hearing and that he and Witter had never lived apart. The state court set aside the annulment based on Petitioners' representations. However, the State subsequently charged Nee Ntreh with perjury based on his representations regarding the annulment.

After the deportation proceedings were set for hearing, Nee Ntreh requested a continuance until the state criminal perjury charges against him were resolved. Nee Ntreh explained that he wished to testify in his own defense but did not wish to sacrifice his Fifth Amendment privilege against self-incrimination. The Immigration Judge ("IJ") denied the continuance. However, the IJ did not compel Nee Ntreh to take the stand when the INS called him as a hostile witness.

The IJ found Witter and Nee Ntreh deportable as charged. On appeal, the BIA affirmed the IJ's denial of a

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[3] INA § 241(a)(1)(G)(ii) states: "An alien shall be considered to be deportable as having procured a visa or other documentation by fraud . . . if . . . it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's entry as an immigrant."

continuance and its determination that both Witter and Nee Ntreh were deportable for willful misrepresentation under INA § 212(a)(19). However, the Board dismissed the alien smuggling charge against Witter, finding no evidence that Witter had engaged in smuggling "for gain," an essential element of the offense. The Board also dismissed the marriage fraud charge against Nee Ntreh.

Petitioners timely petitioned for review, arguing that (1) the BIA erred in refusing to relate back the order vacating the annulment to validate their marriage ab initio, thus curing any alleged misrepresentation on their visa petition; (2) the Board erred in finding that there was no common law marriage; (3) the Board erred in finding Petitioners' misrepresentations to be "willful"; (4) Witter's representations of marital status were immaterial to her visa application, thus INA § 212(a)(19) does not apply to her; and (5) the Board abused its discretion in affirming the IJ's denial of Nee Ntreh's motion for continuance.

II

We have jurisdiction to review the Board's decision under INA § 106, 8 U.S.C. § 1252(a).[4] We will affirm an

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[4] Congress recently passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, which significantly curtail our jurisdiction to review certain orders of the Board. *See Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir.1996), cert. denied, ___ U.S. ___, 117 S.Ct. 694, 136 L.Ed.2d 617 (1997); *Pichardo v. INS*, 104 F.3d 756 (5th Cir.1997); 8 U.S.C. § 1252(a)(2)(C) (removing federal court jurisdiction to

order of deportation issued by the BIA if supported by "reasonable, substantial, and probative evidence on the record considered as a whole." *Carbajal-Gonzalez v. INS*, 78 F.3d 194, 197 (5th Cir.1996) (internal citations omitted). We review findings of fact for substantial evidence. *Id.* We will affirm the Board's findings of fact unless the alien can show that the evidence in his favor "was so compelling that no reasonable factfinder could conclude against it." *Id.* We review conclusions of law de novo, but with deference to the BIA's interpretation of ambiguous statutory provisions. *Id.*

A

The state court order vacating the annulment retroactively validated Petitioners' marriage from its inception under Texas law; thus, Witter and Nee Ntreh are now formally married. Petitioners assert that the order vacating the annulment proves that they were married at the time of entry, and thus their statements concerning marital status on their visa applications were not misrepresentations. The BIA affirmed the IJ's finding that although the order vacating the annulment "may be valid for all concerns of the state, . . . it cannot and does not make a lie uttered to a visa officer in 1989 a truthful statement when it was made." Petitioners assert that the BIA erred

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review deportation orders based on certain criminal convictions). However, the AEDPA and IIRIRA do not affect our jurisdiction to consider orders involving application of INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), or its predecessor provision, INA § 212(a)(19).

in refusing to give retroactive effect to the order to cure the misrepresentation.

We have never specifically addressed this issue; however, Petitioners' assertion is contrary to decisions of the Seventh and Ninth Circuits and the BIA. In *Hendrix v. INS*, 583 F.2d 1102, 1103 (9th Cir.1978), the Ninth Circuit held that a woman admitted to the United States based on her representation that she was unmarried could not retroactively cure the fact that she was married at the time of entry by obtaining a subsequent annulment. The court held that "[u]nless unusual circumstances dictate that in the interest of justice retroactive effect should be given . . . it is the marital status at the time of entry that should serve as the basis for one alien's preferment over others." *Id.* (internal citation omitted).

The Seventh Circuit, in a case factually similar to *Hendrix*, held that willful misrepresentation under INA § 212(a)(19) focused on the alien's subjective state of mind at the time of the representation, not on technical legal issues involving the validity of the marriage or retroactivity of the annulment under the law of the jurisdiction in which it was granted. *Garcia v. INS*, 31 F.3d 441, 443 (7th Cir.1994). The court accordingly refused to give retroactive effect to an annulment procured after entry to the United States to sanction a willful misrepresentation made at the time of application for the visa. *Id.*; *see* also Matter of Magana, 17 I & N Dec. 111 (BIA 1979) (alien who entered United States based on marriage to American citizen although already married to noncitizen could not overcome charges of fraud by subsequently having first marriage annulled); cf. Matter of Astorga, 17 I & N Dec. 1 (BIA 1979) (holding that annulment related back to

original date of marriage where there was no fraud, misrepresentation, or manipulation of immigration law).[5]

The BIA found that Witter and Nee Ntreh were not legally married under Texas law at the time of their visa applications, regardless of the legal fiction created by the subsequent order vacating the annulment. The record shows that Petitioners sought to vacate their annulment only after they learned that the INS contemplated deportation proceedings against them. The fact that this case involves an order vacating an annulment, rather than an annulment as in the precedents cited, does not alter the application of the basic principle that changes in marital status undertaken after entry into the United States should not be used to manipulate immigration law. *See Garcia*, 31 F.3d at 444; *Hendrix*, 583 F.2d at 1104. The BIA properly refused to relate back the order vacating the annulment to cure Petitioners' misrepresentations.

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[5] Petitioners' reliance on *Mayo v. Schiltgen*, 921 F.2d 177 (8th Cir.1990), is misplaced. In that case, the Eighth Circuit stated that an alien who represented that she was unmarried on her visa application despite the fact that she believed she was married might not be guilty of misrepresentation if her marriage was void under the law of her home country at the time of entry. *Id.* at 180. *Mayo* apparently conflicts with the Seventh Circuit's holding in *Garcia* that § 212(a)(19) focuses on the alien's state of mind, not legal technicalities. We need not decide which is the proper interpretation of the statute. As an initial matter, the Eighth Circuit's pronouncement was dictum; the court reversed and remanded because the district court affirmed the BIA on grounds that the agency had not considered. Furthermore, in the instant case, the BIA found that Witter and Nee Ntreh, unlike Mayo, both believed that they were unmarried at the time of entry to the United States and were, in fact, unmarried at that time under Texas law.

B

Witter and Nee Ntreh next claim that even though their 1988 ceremonial marriage had been annulled, they subsequently entered into a common-law marriage prior to their visa applications. Therefore, they argue, they did not misrepresent their marital status. This argument lacks merit. First, the BIA found that Petitioners relied upon their annulled 1988 ceremonial marriage, not upon a subsequently arising common law marriage, when representing that they were married on their visa applications. The record shows that Petitioners listed 1988 as their marriage date and presented their 1988 marriage certificate to the embassy as proof of their marital status. There is no evidence that Petitioners informed the visa officer that the ceremonial marriage evidenced by the certificate had been annulled and that they were instead relying on a common law marriage arising after the annulment.

Furthermore, the Board found that the evidence did not support the existence of a common law marriage. Under Texas law, three elements are necessary to establish a common law marriage. The parties must (1) agree to be married, (2) live together after the agreement as husband and wife, and (3) represent to others that they are married. Tex. Fam.Code Ann. § 1.91(a)(2) (Vernon 1993); *see* Estate of Giessel, 734 S.W.2d 27, 30 (Tex.App. 1987, writ ref'd n.r.e.). Substantial testimonial and documentary evidence supports the BIA's findings that after the annulment, Petitioners resided at separate addresses, listed themselves as single on various documents, referred to each other as "friends," "cousins," "relatives," or siblings, and, in light of the circumstances surrounding the annulment, never formed the requisite intent to be

married. Therefore, the Board properly found that Petitioners were not married under the common law at the time of their visa applications, and their averments to the contrary constituted misrepresentations.[6]

C

Petitioners argue in the alternative that any misrepresentations concerning their marital status were not made "willfully" as required under § 212(a)(19). The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary. *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir.1977). Proof of an intent to deceive is not required; rather, knowledge of the falsity of the representation is sufficient. *Id.*; *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir.1995).

Petitioners argue that they held a good faith belief that they were married because they had no knowledge of the annulment decree. Substantial evidence, however, supports the BIA's conclusion that both Petitioners were aware that their marriage had been annulled. Nee Ntreh initiated the annulment proceeding and was personally present at the hearing. Although Witter did not attend the hearing, she signed a waiver of citation and notice in the

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[6] Moreover, the BIA did not abuse its discretion by refusing to consider new evidence proffered by Petitioners on appeal on the grounds that the evidence was either available prior to the IJ's decision or was immaterial to deportation. *See Reyes-Hernandez v. INS*, 89 F.3d 490, 494 (7th Cir.1996) (noting that although Board may receive evidence not submitted to IJ, its practice is not to do so, but rather to remand to IJ only if it believes evidence might change outcome).

cause, effectively conceding the allegations made in the annulment petition and explicitly allowing the court to consider the petition without further notice to her. Court records show that a copy of the annulment decree was mailed to her address.[7] Therefore, the BIA properly determined that both Witter and Nee Ntreh knew at the time that they applied for their visas that their marriage had been annulled.

D

Witter argues that even if she willfully misrepresented that she and Nee Ntreh were married, INA § 212(a)(19) does not apply to her actions. The statute requires that the willful misrepresentation be material to the procurement of a visa. Although Nee Ntreh's visa was contingent upon his purported marriage to Witter, Witter sought entry to the United States based on her employment as a nurse. Witter's marital status, while relevant to Nee Ntreh's entry, was irrelevant to the procurement of her own visa petition. *See Kungys v. United States*, 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988) (holding that test of whether misrepresentations are material is whether they had natural tendency to influence decision

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[7] The court records indicating the address to which notice of the annulment was sent did not specify Witter's apartment number. Witter argues that this omission proves that she did not receive actual notice of the final decree. We disagree. The omission of the apartment number is not conclusive proof that the annulment decree was never properly delivered. Moreover, the IJ found Witter's testimony that she "couldn't remember" receiving notice of the annulment decree not credible.

of INS); *Forbes*, 48 F.3d at 442-43 (applying *Kungys* definition of "materiality" to INA § 212(a)(19)). Witter argues that § 212(a)(19) does not apply to aliens who make misrepresentations material only to the procurement of visas for others.

Witter did not raise this issue before the IJ or on appeal to the Board, and neither the IJ's nor the BIA's decision addresses the question. We have no jurisdiction to consider issues that were not presented to or considered at the administrative level on appeal. *Yahkpua v. INS*, 770 F.2d 1317, 1320 (5th Cir.1985); *Ka Fung Chan v. INS*, 634 F.2d 248, 258 (5th Cir.1981); INS § 106(c), 8 U.S.C. § 1252(d) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies . . . ").

Witter, however, asserts that she was unaware that INA § 212(a)(19) constituted the basis of her deportability until the Board issued its final decision. Witter argues that the IJ's decision after remand strongly suggested that her deportability rested on the alien smuggling charge, not § 212(a)(19). Only after the BIA dismissed the smuggling charge and affirmed her deportation was it clear that § 212(a)(19) constituted the basis of her deportation. Therefore, Witter asserts, she had no opportunity to raise the issue of materiality before the Board.

We disagree. The show cause orders issued to Witter clearly charged her with both misrepresentation of a material fact for the purpose of procuring a visa for Nee Ntreh and with alien smuggling. Although the IJ's decision does not specifically discuss the individual charges or their elements and couched its discussion of Witter's

deportability in terms of "aiding and abetting," the IJ specifically found Witter "deportable as charged." At no time did the IJ dismiss the § 212(a)(19) charge against her, and either charge alone was sufficient to support her deportation. Witter's neglect in failing to raise the issue of materiality before the Board does not excuse her failure to exhaust her administrative remedies. Consequently, we lack jurisdiction to consider the materiality of Witter's misrepresentations.

E

Nee Ntreh argues that the BIA abused its discretion by affirming the IJ's denial of his request for a continuance of the deportation proceeding until the completion of the pending state criminal proceeding against him. The grant of a continuance of a deportation hearing lies within the sound discretion of the immigration judge, who may grant a continuance upon a showing of good cause. *Patel v. INS*, 803 F.2d 804, 806 (5th Cir.1986); 8 C.F.R. § 3.29 ("The Immigration Judge may grant a motion for continuance for good cause shown."); 8 C.F.R. § 242.13 ("After the commencement of the hearing, the Immigration Judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

Nee Ntreh asserts that he was unable to testify in his defense at the deportation hearing because to do so would have jeopardized his Fifth Amendment right against self-incrimination in the criminal proceeding. The BIA found that Nee Ntreh failed to show good cause for a

continuance, citing the Third Circuit's decision in *Musso v. INS*, 574 F.2d 794, 795 (3rd Cir.1978) (rejecting argument that choice between asserting privilege against self-incrimination and entry of defense in deportation proceeding unlawfully burdened exercise of Fifth Amendment rights).

We find no abuse of discretion in the Board's determination. The mere fact that a parallel criminal proceeding exists does not undercut Nee Ntreh's constitutional privilege. *Hoover v. Knight*, 678 F.2d 578, 581 (5th Cir.1982) (holding that parallel criminal and civil proceedings alone do not raise questions of constitutional magnitude with respect to privilege against self-incrimination). Nee Ntreh was under no obligation to testify at the deportation hearing; his Fifth Amendment right against self-incrimination was thus unimpaired. Neither Nee Ntreh's testimony, nor a negative inference drawn from his failure to testify, was necessary for a finding of deportability. Indeed, the record does not indicate that the Board drew any negative inference from Nee Ntreh's silence, even though it would have been constitutionally permitted to do so. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) (holding that Fifth Amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); *Hoover*, 678 F.2d at 582 n. 1 (applying *Baxter* in deportation context). The decision whether or not to testify necessarily implies some collateral limitations on one's ability to assert a claim or a defense. Such difficult litigation choices, however, do not substantially infringe Fifth Amendment rights. *Hoover*, 678 F.2d at 582; *Musso*, 574 F.2d at 795.

Moreover, although Nee Ntreh argues that the IJ merely had to postpone the proceedings for "a matter of weeks," Nee Ntreh was unable to inform the IJ, when requesting the continuance, when he expected the criminal proceedings to be completed. In fact, Nee Ntreh's counsel informed the IJ that the criminal proceedings were not a priority because Nee Ntreh was out on bond, thus implying that the continuance might be lengthy. The BIA did not abuse its discretion in affirming the IJ's refusal to grant a continuance of indefinite duration.

III

Finally, Petitioners request that we remand the case for consideration of their eligibility for voluntary departure under INA § 244(e), 8 U.S.C. § 1254(e). Petitioners did not request voluntary departure in the agency proceedings. To qualify for voluntary departure in lieu of deportation, Petitioners must establish that they have exhibited good moral character for at least five years prior to their request. INA § 244(e). In light of the IJ's determination that they had misrepresented their marital status in November 1989, Petitioners assert that they could not have qualified as persons of good moral character under the statute until November 1994, when their appeal was already pending before the Board. *See Cipriano v. INS*, 24 F.3d 763, 764-65 (5th Cir.1994) (holding that time required for relief from deportation continues to accrue during nonfrivolous appeal to BIA).

We do not find that these new circumstances warrant remand. A motion to reopen filed with the BIA is the proper procedure for proffering new evidence pertaining

to a request for discretionary relief from deportation. *Faddoul v. INS*, 37 F.3d 185, 190-91 (5th Cir.1994); 8 C.F.R. § 3.2.

IV

For the foregoing reasons, we AFFIRM the decision of the BIA in all respects.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGES
DALLAS, TEXAS 75202

IN THE MATTER OF:

Marcia WITTER
and Abraham NEE-NTREH,

IN DEPORTATION PROCEEDINGS

RESPONDENT A42 395 049
RESPONDENT A42 395 050

CHARGE: INA Sec. 241 (a)(1)(A)
(1) Obtaining visa by fraud and (2) assisting another to obtain visa by fraud

APPLICATION: Termination of proceedings.

APPEARANCES OF COUNSEL

FOR THE RESPONDENT	FOR THE SERVICE
Richard Fernandez,	Paul Hunker,
Attorney	INS Trial Counsel
Dallas, Texas	Dallas, Texas

DECISION AND ORDER OF
THE IMMIGRATION JUDGE

Marcia Maureen Witter is a native of Jamaica and a British citizen who entered the United States at Dallas as a nurse/employee on November 20, 1989. In these proceedings the Immigration and Naturalization Service (INS) has accused her of helping Abraham Nee-Ntreh to enter the United States illegally as her spouse by defrauding a visa officer in London on November 17, 1989 about their true marital status. The INS position is that they

were not married at the time of their visa interview or when they arrived in the United States.

Abraham Nee-Ntreh is a native and citizen of Ghana who is accused of entering the United States illegally at Dallas on November 20, 1989. He was admitted to the United States on that date as a visa bearing immigrant spouse of Marcia Witter. The INS now says that he is an immigrant alien who falsely claimed to be married to Marcia Witter and one who obtained his visa as her spouse by fraudulent misrepresentations to a visa granting official in London, England on November 17, 1989.

The respondents claim to be a husband and wife and seek termination of the proceedings. The INS has accused both of being deportable in separate Orders to Show Cause (OSC) issued on June 2, 1993. Concerning some things, there is no dispute; the couple are aliens and they were married to each other on August 25, 1988 by a Justice of the Peace in Dallas, Texas. But, it is claimed by the INS that the marriage between the two was annulled before they were interviewed about Mr. Nee-Ntreh's visa application and his marital status in London on November 17, 1989. Now the INS says that a Texas Court's 1993 Bill of Review which facially annulled the annulment was obtained by false testimony and it should be ignored in these proceedings.

The respondents contend that the July 9, 1993 decree in an action for a Bill of Review retroactively set aside the June 19, 1989 annulment of their August 25, 1988 marriage and that as a legal result of the Bill of Review, their marriage was in full force and effect on November 17,

1989 when Mr. Nee-Netreh [sic] obtained his visa. Alternatively, it is claimed that because of the Common-Law marriage policies of Texas and the conduct of the parties since 1988, they should be regarded as married since August 25, 1988.

The contested deportability of the two aliens was tried on May 18, 1994. Evidence included both documents and testimony. The OSC was designated as Exhibit one and a form I-126 was designated as exhibit two in each case. The INS offered a 141 page packet of documents which were indexed under a cover form G-29 filed on May 13, 1994. On November 8, 1993, the INS also submitted Ex. A, a "Final Judgment" concerning a Bill of Review and a marriage license, Ex. B, the petition for a Bill of Review, Ex. C., a transcript of the hearing before Judge Lykes, Ex. D., a transcript of the annulment hearing, Ex E., the letter from Judge Lykes who granted the Bill of Review. The respondents submitted an indexed package of documents including an affidavit of Mr. Ron Robertson, phone bills, insurance and bank documents, a deed for real estate, ban statements and property tax records. Testimony was taken from twenty witnesses.

The INS called Mr. Richard Sinzinger, the attorney who represented Mr. Nee Ntreh concerning his annulment. He declined to testify because of the attorney-client privilege and was released.

Tyrersa Tunnell, manager of the Vineyards Apartments at 8850 Ferguson Road testified about the records of the apartment leased to Marcia Witter, #2016. Her records started in September of 1987 and went through March of 1991. Ms. Witter was listed as the only tenant

and she gave her marital status as single. Parkland Hospital arranged for the apartment for new nurse employees and paid for the first month's rent only. Mr. Fernandez accurately pointed out during her testimony that their telephone records at this apartment reflect that Mr. Nee Ntreh was listed on the phone accounts.

Ms. Laudie Williams, employee benefits supervisor at Parkland Hospital testified. She indicated Ms. Witter was listed in the hospital benefits records as single. Employees are not required to change these forms if their status changes.

Ms. Sue Thomas, the payroll supervisor at Parkland Hospital testified that Ms. Witter is listed in her records as married, but she is listed that way only since December 21, 1993. She was listed as single throughout her employment and her address is listed in her records as 12480 Abrams Road.

Ms. Irene Smith, manager of the Colony Square at 9814 Parkland Place and Valley Meadow apartment complexes, said these apartments are in the same locale and just face different streets. Her office is at the Valley Mill facility. Ms. Witter started as a tenant at a condo owned by a Mr. Green in the complex. Ms. Witter was listed in her records as a single tenant and Mr. Nee Ntreh was listed as a friend to be notified in case of an emergency. The nearest relative listed in Ms. Witter's file was an aunt, Dorothy Black. She knew Mr. Nee Ntreh and had seen him on the premise.

Janice Blissell, the Parkland Hospital Nurse Services Coordinator said she knew Ms. Witter for five years and that in February of 1994 Ms. Witter began to wear a

wedding ring. She did not know Mr. Nee Ntreh and only met him just before the hearing. She regards Ms. Witter as an excellent nurse and one who enjoys a good reputation for character and honesty.

Mr. Al Houghton, a criminal investigator for HUD testified about the condo purchase by these respondents in January 23, 1990. They bought it as two single people. Mr. Nee Netreh [sic] tried to buy it by himself and was rejected because of inadequate income in September of 1989. Ms. Witter joined the loan application and the sale was approved.

Mr. Gary Matney, the Registrar at Richland College testified about Mr. Nee Ntreh participation at the college from the Summer of 1985 until the Summer of 1988 and a reapplication in the Spring of 1992. He stated that the college records show this respondent made a false claim to being a citizen of the United States and thereby got tuition benefits valued at about $5,000.00.

Officer Hauser of the University of Texas Campus Police investigated threats made by Mr. Nee Netreh's [sic] brother. Mr. Nee Ntreh was caught in plagerism and was expelled in September 1991. In the records of the University concerning Mr. Nee Ntreh, Ms. Witter is at various places listed as his sister (twice), a relative (twice), and a cousin (once). She was never listed as his wife on any documents Mr. Hauser saw.

Mr. Ed James employed by a mortgage company, Accounting Edge, said he hired Mr. Nee Ntreh for two periods, one for ten months and the second for a week or two. The respondent gave him a form I-9 with a false

claim of citizenship and he misrepresented himself to Mr. James as a person with an accounting degree.

Mr. Chris Steckman, a special (fraud) investigator for the U.S. Dept. of Education, testified that he found false claims of citizenship in the respondent's student loan applications. He applied as a single person and obtained funds. If he was married, his wife's income would have been considered and he might not have qualified for the loan.

Mr. John Mitchell, a managing partner of a temporary employee business said that Mr. Nee Ntreh gave him false claims to citizenship in a resume and an I-9. He marked his W-4 as being single as recently as January 23, 1994 and he falsely claimed to have an accounting degree in August of 1991.

Ms. Brenda Tyer an officer manager of a company that hired temporary employees, testified that Mr. Nee Ntreh worked three times for her employer. He indicated he was single on his W-4 tax forms and made false claims to citizenship on the I-9 forms he submitted.

Andrea Evelyn Clark testified that she is the Director of Human Resources for the Wadley Blood Care Facility. Mr. Nee Ntreh made a false claim of citizenship to her in an employment application and claimed to be single on his W-4 form. He also claimed to be single in papers for life and health insurance as late as April of 1993. He added Ms. Witter as his spouse in July 1993 after deportation proceedings began. He was fired for making a false claim to possession of an accounting degree from the University of Texas at Dallas.

Paul Elliott of the United States Secret Service participated in an arrest of Mr. Nee Ntreh at 12480 Abrams Road, Apartment 2823 on April 29, 1993. During a security sweep of the apartment for the safety of the arresting officers, he observed that there was no sign of occupancy in the apartment by any female tenant.

Special agent James Heaton of the INS testified that he checked driving license records concerning both respondents and investigated where they were each living in February of 1993. Ms. Witter told him they were still married and their marriage was not annulled. She agreed that she signed the waiver of citation concerning the annulment. Some of her neighbors told him Ms. Witter lived alone, some did not know if Mr. Nee Ntreh lived there or not. Their license records showed that they had different addresses on their respective driver's licenses.

The INS called as a hostile witness and he refused to testify based on his rights under the constitution of the United States.

Ms. Witter testified that she and live at 12480 Abrams Road in Mr. Green's condo #2823. She is a nurse practitioner at Parkland Hospital and married Nee Ntreh on August 25, 1988. She agreed that she signed the waiver of citation form and said she did not know when the annulment was granted. She said they lived together as husband and wife when interviewed concerning Mr. Nee Ntreh's visa in London on November 17, 1989. She said that she was not aware that the annulment had been granted at that time. She became a legal permanent resident during the same trip to England and they entered

the United States as residents together on the same date, November 20, 1989.

Ms. Witter said that she lived on Ferguson Road after July 12, 1987. The lease said she was sole occupant and a single person as of December 3, 1988 and May 20, 1990. The Colony Square condo lease also said she was single because she was of the opinion the rent would be less for a single person. Mr. Nee Ntreh was listed on the lease documents as a friend and she still regards him as her friend and her husband as well and they still reside together. She agreed that she was listed as single when they moved out of the Vineyard Apartment and also on the Colony Square apartment lease.

Ms. Witter claimed that she did not sign the HUD note and did not sign the purchase documents. She said she did not know why she was listed as single and claimed that she did not know that at the time they acquired the apartment. They bought it because it was close to Parkland Hospital. She agreed that she listed Mr. Nee Ntreh as merely a friend in her hospital life insurance forms and that he is mentioned in her retirement forms as living on Abrams, not at the condo they bought through HUD because, we lived in both places. She agreed that she was listed as being single in papers dated June 19, 1991.

Ms. Witter asserted that she did not know Mr. Nee Ntreh had claimed to be a citizen so many times or why he referred to her as a relative, or a sister or as a cousin. She also agreed that she changed records of her marital status at her place of employment after an OSC was issued in these cases, but she said she said she did not

know if she was motivated to do that by the filing of the OSCs or not.

Ms. Witter claimed she and Mr. Nee Ntreh were married during the visa interview in London because she regarded herself and Mr. Nee Ntreh to be back together then after being separated briefly between March and June in 1989. She indicated that at various times they had loans together concerning personal property. She wrote all of the checks because she had most of the income. She did not know he was getting student loans and asserting in those applications that he was single. She claimed again that she thought she was genuinely married when she spoke to the visa official in London. They filed tax returns jointly only one time, perhaps. They usually filed separately. Their cars were registered at different addresses. She noticed that the annulment petition asserted that she worked for the St. Paul's Hospital and that she never had been employed there. It was pointed out to her that the annulment record of the clerk of court, (Govt exhibit pager [sic] 110) indicated that the annulment judgment had been mailed to her and she responded that she did nor remember having received it.

Mr. Ron Robertson testified that his affidavit submitted in advance was still correct. He had not seen them since 1989 when he knew Mr. Nee Ntreh at work and he met Ms. Witter through him. He did not know about their annulment or their having two addresses. He thought they were a married couple when he and his wife knew them in 1989. He had been a dinner guest in their home. He thought he might have seen them once or twice

between 1989 and 1994, but it seemed clear he was associated with them mostly in 1989. He thought they lived on Abrams Road or on Skillman St. in Dallas.

Mr. Holmes Green owns the condo the respondents rented between December 1991 and October or November 1993 at the Colony Square apartment site at 9814 Parkland Place. He said he met Ms. Witter first a couple of months before she moved into his condo. Before the trial Ms. Witter told him that she leased it as a single person because she thought the rent was less expensive or that he might not be willing to rent it to a couple. He indicated that it was not obvious that they lived there all of the time, but they were there often. He met Mr. Nee Ntreh several weeks after he met Ms. Witter and that when they moved out, they moved out at different times. He did not know about their annulment and thought that from time to time they used a condo they owned at 12480 Abrams Road. His understanding was that they rented his place because it was closer to Parkland Hospital than their condo on Abrams Road.

Ms. Sara Makan testified that she is a legal resident and obtained that status as a nurse working for Parkland Hospital like Ms. Witter did. She said the hospital got both of them their apartments in the Vineyard Apartment at 8850 Ferguson Road and they met working at the hospital. She lived at the Vineyard Apartments between November 1987 until December 1989 and met Mr. Nee Ntreh there. Ms. Witter referred to him as her husband in conversations with Ms. Makan and she thought they were married based on her observations of them together. Ms. Makan left the Parkland Hospital in April or May of 1992 and was not aware of any annulment, or times when the

couple referred to themselves as single, or of any separate addresses or other details of their life.

It is evident that the INS thinks there never was a marriage between these respondents which could be true. The evidence, however, more clearly reflects other things which I think determine the final result. The involvement of annulment litigation and a Bill of Review to nullify a prior judgment make this an unusual case. And like cases that involve divorce or more conventional sham marriage issues, this case is one that depends most of all on the credibility of witnesses and primarily the credibility of the respondents themselves. I held that view when I decided this case on May 18, 1994 and this view is unchanged after review of the transcript. In drafting this opinion, it has been my intent not to alter or significantly change my original decision which I expected only to indicate my findings about deportability and not be the end of the litigation. I expected one or both parties to seek relief. My intention is to explain my ruling more completely and to fulfill the mandate of the Board of Immigration Appeals. With that in mind, I will for the most follow my original remarks as set out starting on Page 242 of the transcript.

I hold that at the time of the London visa interview in November of 1989 there was no marriage between these two respondents. There might have been a brief marriage after the ceremonial marriage on August 25, 1988, but that had ended before the interview. A court of the State of Texas decreed that the marriage was null and void and never existed, all based on testimony and the annulment pleadings set forth by Abraham Ntreh with service of citation or notification of the actual filing of the suit being

waived by Marcia Witter. At the time of the interview in London, neither of them were married despite their claims now. The so called paper trail is not for just 1991 and 1992, it goes all the way back to 1987, before Marcia Witter married, and it was brought up to the very day of the hearing.

We have been shown several addresses and two being used at the same time which have been discussed at great length by many of the witnesses. We have been shown no claims to marriage except when it was to the benefit of the parties after the Orders to Show Cause were issued. We have seen that both respondents have made repeated claims to being single after the August 25, 1988 marriage and after the June 19, 1989 annulment and after the annulment was annulled on July 9, 1993. We have seen claims that the respondents referred to each other at various times as being merely friends, cousins, siblings, other relatives, an accountant, anything but husband and wife for the most part during that whole period. We have been shown evidence of repeated fraud by Mr. Netreh [sic] in claiming to be a citizen of the United States. We have seen an amazing lack of memory on the part of Ms. Witter except when it is to her benefit to remember.

The question here related to Ms. Witter is whether she aided and abetted Mr. Netreh [sic] to enter the United States without being married in November of 1989. Since their annulment was in June of 1989, I cannot possible conceive of her not knowing of the annulment and his true marital status. She assisted him in entering the United States by fraud just as much as if she had put him in the trunk of her car and crossed the border with him.

As to Mr. Ntreh, the question is whether or not he knew that the August 1988 marriage had been annulled and that he was not genuinely married in November of 1989. As to him, I think there is no doubt of his obtaining his visa and entry into the United States by fraud; none whatsoever. And his attempt to cover up this fraud has now led to his indictment for perjury.

I recognize that an indictment is not evidence in the same manner that a no true bill by a grand jury is not evidence. An accusation is not evidence of guilt and a no bill is not evidence of innocence. In this country, even a verdict of not guilty in a criminal case might not resolve disputes like this because of the difference between criminal and civil courts and the burden of proof. I further hold that the letter from Judge Lykes should not be in evidence because it is an opinion she might have testified about had she been called, but she was not called and did nor testify.

As I have stated before, based on the testimony of all of the witnesses and all of the documents, I find that the charge that Abraham Nee Ntreh obtained his visa by fraudulently representing to the visa authorities in England that he was married when the truth of the matter was that his marriage had been annulled has been well established by the evidence. The very best evidence of his knowledge about the annulment is contained in the transcripts of the annulment proceeding and the transcript of the proceedings before Judge Lykes that resulted in her granting the Bill of Review and thereby annulling the 1989 annulment – in 1993. The many other deceitful acts and declarations about citizenship and his educational accomplishments add depth to the perception that the

truth is not in this man. Even had he testified that in his heart of hearts he always felt married to Ms. Witter, I would not believe him, because of the numerous inconsistent statements he made over time to get loans, advantages of various sorts at schools, jobs and the like. In my view, his testimony cannot be accepted as reliable because in the event Ms. Witter is truthful about not knowing about the annulment going through court, than she has been perhaps his most gullible and most lied to victim. His deception of her shows the man has lied even to one who professes she thinks she is his spouse. He maintained that lie from the time he got the judgment of annulment until she learned the judgment was granted. It could have been only for a couple of days or much, much longer. Whatever may be the truth about her knowledge, without question Mr. Ntreh knew he got the annulment, even when he lied about it to Judge Lytle.

I do not know of any precedents in state or federal courts or the BIA on the point of annulment of annulments and the effect thereof on immigration benefits under the INA. Sham marriages and sham divorces are ignored notwithstanding the fact that on paper they appear to be valid fully effective legal events. With that in mind, my view is that the effect of a 1993 civil decree in Texas annulling a 1989 annulment may be valid for all matters of concern to the state, but it cannot and does not make a lie uttered to a visa officer in 1989 a truthful statement when it was made. The marriage was unannulled when Mr. Nee Ntreh was admitted to the United States as the husband of Ms. Witter.

The claim has been made to me that the way the parties lived after the annulment judgment was entered

on June 19, 1989 created a common-law marriage. Related to that, neither party told the visa officer that the August 1988 marriage evidenced by their marriage certificate was a nullity and that the real marriage came into existence some uncertain time after June 19, 1989. The marriage relied upon as the basis for the visa was the 1988 marriage declared null by the Texas court, not a 1989 common-law marriage. It is suggested that whenever parties live together and tell somebody they are married they are always viewed as married in Texas. But, that is not accurate. Texas courts do not always find people to be married after they were once married and the marriage was terminated by the state. See for example, *Flores v. Flores*, 847 S.W. 2d. 648 (Court of Appeals, Waco 1993) where there was no common-law marriage after a divorce. In another case where the divorce was secretly obtained by one marital partner, the divorce was effective even though they continued to live together as if married. *Clack v. Williams*, 189 S.W. 2d 503 (Ct. of Civil Appeals, San Antonio 1945). Another case concerning property rights involved a divorce obtained secretly. This case reflects that the jury concluded that the innocent party who signed a waiver of service of the petition should have checked to see what had happened to the suit. *Oliver v. Oliver*, 889 S.W. 2d 271 at page 272 (Sup. Ct. of Tex. June 4, 1994).

It is my understanding that while Texas recognizes common-law marriages, it does not recognize unilateral commitments to marriage as marriages. Both parties must consent to the relationship and in this case, Mr. Ntreh was most persistent in disavowing the relationship in a wide and diverse variety of circumstances. Thus, given

the inconsistent declarations of both parties, I doubt or at least seriously question that a Texas court that knew about the two transcripts and all of the other denials of a marriage, would hold that these parties began a marriage at some point after the annulment and before the Bill of Review. I also question that another court would accept the Bill of Review as effective, if all of the circumstances were known to the court.

The evidence about Mr. Abraham Nee Ntreh being a deportable alien is persuasive beyond a reasonable doubt. The government's evidence is clear, convincing and absolutely unequivocal and the rebuttal evidence lacks a convincing weight. I accept the testimony of those who said they believed these two persons were married as actually being their opinion, but I do not think that those who held those opinions knew all of the relevant facts and based on the totality of evidence before me, I think the governments evidence is the more reliable evidence, particularly on the issue of the annulment being effective and in force when the parties were interviewed in London. The testimony of the parties themselves is in my opinion, most unreliable.

Turning to the question of the deportability of Ms. Witter, I agree with counsel for her that the evidence concerning her is not as strong as the evidence concerning Mr. Nee Ntreh. Nevertheless, it is quite clear that she has persistently misrepresented facts. I do not regard her use of her maiden name as important because many women with professional jobs use their maiden name and it is not required by law that a woman adopt the man's name. She has clearly asserted to several people that she was single to get a lower rent or a lease she doubted she

could get if her married state was known. That is not perjury and might not be illegal, but it is deceitful and for an advantage over the other party involved, such as Mr. Green. The apartment managers and he establish her deceitful ways. She may have lied during this trial. She said she did not sign the note or mortgage associated with her acquisition of the condo these parties bought together. I find it implausible that she did not sign such documents and feel that if she did not, she should have produced evidence that her signatures were forged.

Her assertion that she did not remember getting notice of the entry of the annulment judgment is not a denial that she got the notice. The address on the court record was one that she used and she persistently said they she and Mr. Nee Ntreh used both residences. She did not move out of the Ferguson Road apartment until long after the annulment was entered and notice was mailed to her. Based on the record of the court which is apparently very reliable and positive evidence and therefore entitled to more weight than negative evidence, I hold that a copy of the annulment judgment was mailed to Ms. Witter at one of the addresses she used and that she had actual and legal notice of the entry of the annulment, even if she forgot when the annulment happened. She clearly knew she had signed a waiver of service and citation and she was bound by the judgment of the court when she claimed to be married based on the 1988 marriage ceremony to a visa officer in London in 1989. (See the minute entry at page 110 of the government exhibit.)

As to whether or not Ms. Witter should be believed in her assertions that she did not know that her marriage

had been annulled, I find that her testimony is not credible. I do not think she is credible about anything related to her relationship to Mr. Nee Ntreh, although she may be reliable in dealings with her professional activities for Parkland Hospital. I think that there were advantages to the charade that these parties maintained over a long period of time and that she was willing to participate in the deceit and deception of others for whatever she had to gain from the matter. She may have had a close friendship, even an intimate friendship with Mr. Nee Ntreh, but I do not think that these two respondents had a bona fide marriage or that they intended to create a life together at the time they went through the ceremonial marriage or when they resumed living together after the annulment was decreed by the state court.

Even though there may be a *de jure* common-law marriage in effect as of the date of this hearing, (May 18, 1994). I think the August 1988 marriage and/or annulment of the annulment were shams for immigration benefits. The fact that these parties have to a very large extent maintained separate accommodations and have maintained a separation from each other in name and in practice in so many different ways contradicts the expressed claim by Ms. Witter that this was a true marriage for all purposes. I find that she did assist him to perpetrate a fraud on the officer who granted him a visa and all other immigration authorities to get him admitted to the United States as her husband. I find that she also is deportable as charged, notwithstanding the fact that the evidence is slightly less clear and slightly less persuasive as to her.

My opinion of the case is also based in part on a lack of evidence. The INS clearly established a *prima facia* case which shifted the burden of proof to the respondents. Much was said about them not being required by law to be truthful to others such as real estate managers. The tax laws, however, do require truthful declarations to be made annually and their returns should have reflected that they were married even if they filed separately. Not to make that status clear, is an offense. So they should have had tax returns showing their status accurately, if indeed they were married or genuinely treating each other as married throughout the whole relevant period. The failure of the parties to introduce such records suggests that the records would not help them. *Matter of Dass* I.D. #3122 (BIA 1989).

FOR THE REASONS STATED ABOVE:

It is ordered that Abraham Nee-Ntreh be deported from the United States to the United Kingdom, or if it refuses to admit him to its territory, he should be deported to Ghana as originally ordered on May 18, 1994.

It is further ordered that Marcia Witter be deported from the United States to the United Kingdom or if it refuses to admit her to its territory, to Jamaica as originally ordered on May 18, 1994.

Effective 5-18-94
Signed 8-29-95 at
Dallas, Texas

/s/ Edwin R. Hughes
Edwin R. Hughes
Immigration Judge

REVERSED AND ACQUITTED; and Opinion Filed December 7, 1998

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00725-CR

ABRAHAM NEE NTREH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F93-04656-US

OPINION

Before Justices Maloney, Whittington, and Roach
Opinion By Justice Roach

Abraham Nee Ntreh appeals his conviction for aggravated perjury. A jury found him guilty, and the trial court sentenced him to ten years in prison, probated for ten years, and fined him $500. In five points of error, he complains the trial court erred in: (1) overruling his objection to testimony based on attorney-client privilege; (2) questioning a witness on prejudicial matters; (3) excluding certain defense evidence; (4) failing to instruct the jury on article 38.18 of the Texas Code of Criminal

Procedure; and (5) making improper comments during trial. In three additional points, he complains the evidence is legally and factually insufficient to support his conviction and he was denied effective assistance of counsel.

For the reasons set forth below, we conclude the evidence is legally insufficient on the issue of identity and sustain the first point of error on that basis. We reverse the trial court's judgment and enter a judgment of acquittal.

Factual Background

Appellant entered the United States in June 1983 on a visitor's visa. Five years later, on August 25, 1988, he married Marcia Whitter. The following year, a petition for annulment was filed in appellant's name. On June 19, 1989, a hearing on the petition was held. Appellant was represented by attorney Richard Sinzinger. The court reporter's record reflects that a man, who said his name was Abraham Nee Ntreh, testified at the hearing to obtain the annulment. At the conclusion of the hearing, the trial judge granted the annulment.

James E. Heaton, Jr., a special agent with the Immigration and Naturalization Service (INS), testified that he investigates violations of the Immigration and Nationality Act. In the spring of 1992, he began investigating appellant, who was issued an immigrant visa and alien registration on November 17, 1989 for entry into the United States. According to Heaton, the visa was issued based on appellant's representation that he was married

to Whitter. However, Heaton was informed that appellant's marriage to Ms. Whitter had been annulled prior to the visa being issued.

After reviewing appellant's "alien file," Heaton believed that appellant had perpetrated a fraud on the immigration service. Heaton obtained a certified copy of the annulment order and a copy of the docket sheet from the district court. The docket sheet reflected that the petitioner in that case had appeared at the annulment hearing. Thereafter, Heaton arranged a meeting with Whitter to try to "manipulate her into testifying on behalf of the government in deportation proceedings against Ntreh." Heaton met with Whitter, who was accompanied by appellant, on February 5, 1993. Heaton gave Whitter her *Miranda* warnings, and the interview terminated.

Several months later, Heaton learned that the annulment had been revoked after appellant represented to the court that he was not present at the 1989 annulment hearing. Heaton contacted Judge Sue Lykes, who signed the order setting aside the annulment, and told her that the docket sheet from the original hearing showed that appellant was present. Lykes told Heaton that if he could prove appellant was at the annulment hearing, she would refer the matter to the district attorney's office.

Subsequently, Heaton obtained a copy of the reporter's record of the annulment hearing. The record reflected that a person who identified himself as Abraham Nee Ntreh testified at the hearing that he wanted the trial court to nullify his marriage. Heaton provided copies of the reporter's record to Judge Lykes.

On cross-examination, Heaton said appellant had been ordered deported and had appealed that ruling to the Board of Immigration Appeals. As part of his investigation, Heaton said he did not talk to appellant's original attorney, Sinzinger, or to the judge who signed the original annulment order.

Sheri Vecera, the court reporter at the 1989 annulment hearing, testified she made a record of the proceeding. She testified that her record reflected that an Abraham Nee Ntreh was present at the hearing. She could not, however, identify appellant at trial as the man who appeared at the annulment hearing. She said that when she listened to the tape recording of the annulment proceeding, she recognized Sinzinger's voice. A second man, who identified himself as Abraham Nee Ntreh, spoke with a "foreign accent." She said she provided a copy of the record to attorney Mark Jacobs, who represented appellant in the hearing to set aside the annulment.

Jacobs, who received immunity from prosecution, testified that appellant contacted him in late 1992 or early 1993 because the INS wanted to deport him. Jacobs obtained and reviewed the annulment documents. Jacobs told appellant the marriage had been annulled, and appellant told him he had no recollection of appearing at the hearing. Jacobs then contacted Sinzinger, who, like appellant, said he had no independent recollection of the hearing.

Jacobs then obtained a copy of the reporter's record of the hearing and informed appellant that the record reflected that he was present in court at the annulment

proceeding. According to Jacobs, appellant continued to deny any recollection of being in court. Jacobs, after speaking to the trial judge who granted the annulment, filed a petition for bill of review. The petition asserted that prior to the entry of the annulment order, appellant and Whitter reconciled and had lived as husband and wife ever since. The petition further asserted that neither appellant nor Whitter appeared at the annulment hearing and it was "unknown how the Order was entered." Both appellant and Whitter signed the document.

Jacobs was asked if, based on his experience as a lawyer in the family courts, it would be a "far-fetched proposition" for someone to go to court and pretend to be Abraham Ntreh. Jacobs replied, "I can't speak for other people. For myself, I hope that doesn't happen. I don't think it's happened before." He identified appellant in court as the man who represented to Judge Lykes that he was not present at the annulment hearing. On cross-examination, he acknowledged that judges do not require witnesses to provide identification, such as a driver's license, at prove-up hearings.

The State's final witness was Judge Lykes, who testified that she would not have granted the petition for bill or [sic] review and set aside the annulment order had she known appellant had appeared at the first hearing. Thus, she said, appellant's testimony that he had not appeared at the hearing was material to her decision to grant the bill of review. When Lykes reviewed the reporter's record from the annulment hearing, she concluded that appellant's testimony was false.

During the trial, the State produced as evidence copies of the court reporter's records from the annulment hearing and bill of review hearing, the docket sheet in the annulment case, the annulment order, Whitter's waiver of citation in the annulment, the original petition for annulment, the docket sheet in the bill of review case, the original petition for bill of review, and the judgment setting aside the annulment. After the State rested, appellant moved for a directed verdict on the ground that, among other things, the State failed to prove he appeared at the annulment hearing. The trial court denied the motion.

Appellant testified that in April 1989, he and Whitter began having marital problems. Appellant retained Sinzinger because he "wanted out [of the marriage] completely." He testified that he asked Sinzinger what he could do, but did not remember "the specifics" provided by Sinzinger. He said after Heaton contacted his wife in February 1993, he learned that the marriage had been annulled.

Appellant testified he did not remember being present at the annulment hearing. He testified that he did not know that his dealings with Sinzinger ended his marriage to Whitter and that he did not receive a copy of the annulment order. When asked what he did remember about the hearing, appellant said:

> See, that's the – that's the whole point that I've answered earlier on. I just can't remember specifically I was with an attorney in any Court for an annulment reading. It's just that I've combed through my mind again and again and again. It's just, you know, the whole situation at the

> time was something that was so unpleasant, see. It wasn't a situation that anybody would like to go through with his wife. Okay? I have forgotten all about this . . . I don't even remember the specifics as to what Sinzinger could have done. . . .

After he learned the marriage had been annulled, appellant visited Sinzinger and asked what happened because "what I wanted to do at that point was to refresh my memory as to what really happened." Appellant testified that Sinzinger had no independent recollection of the case.

After talking with Sinzinger, appellant said he hired Jacobs to investigate the matter. A few months later, Jacobs recommended setting aside the annulment through a bill of review. At the hearing on the petition for bill of review, appellant said Jacobs instructed him to answer only "yes or no" to any questions asked of him. Appellant acknowledged that, at the hearing, he testified "no" when asked whether he had ever shown up for a hearing on the annulment. He said he answered the question that way because he did not remember being in court. He did not answer, "I don't know," because Jacobs had instructed him to answer only yes or no. Contrary to Jacobs's testimony, appellant said he knew nothing about the reporter's record that reflected an Abraham Ntreh was at the annulment hearing. In particular, appellant testified:

> . . . That is the question that I'm trying to dig into. How Mark Jacobs could have found out these things and, yet, took me to the Court and asked me those questions in front of the Judge

> to give him those answers, I paid him two hundred and fifty dollars. That day, we paid him seven hundred and fifty dollars to do that. Would you put yourself in a position you are lying –

The only other defense witness, Judy Spalding, testified that parties who want to reopen an old case can file a petition for bill of review and have an agreed order entered. She testified that an annulment order could be set aside, if both parties agreed, regardless of whether one party appeared at the annulment hearing.

After hearing all of the evidence, the jury convicted appellant of aggravated perjury for falsely testifying in the bill of review proceeding that he had never appeared at the annulment hearing. This appeal ensued.

Sufficiency of the Evidence

In his first point of error, appellant complains the evidence is legally insufficient to support his conviction. In particular, he argues the State had the burden to prove that he was the person that appeared at the 1989 annulment proceeding and failed to do so. After reviewing the record in this cause, we agree with appellant.

When reviewing a challenge to the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *Chambers v. State*, 866 S.W.2d 9, 15 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1100 (1994). This standard leaves to the fact finder to

resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic to ultimate facts. *See Dumas v. State*, 812 S.W.2d 611, 615 (Tex. App. – Dallas 1991, pet. ref'd). The fact finder is the exclusive judge of the witnesses' credibility and the weight to be given their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985); *Dumas*, 812 S.W.2d at 615. Thus, the fact finder is free to accept or reject any or all evidence presented by either side. *See Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991).

To convict a person of an offense, the State must prove every element of the offense beyond a reasonable doubt. TEX. PENAL CODE ANN. § 2.01 (Vernon 1994). To establish aggravated perjury, the State was required to prove that appellant, (1) with intent to deceive and (2) with knowledge of the statement's meaning, (3) made a false statement under oath, (4) that was required or authorized by law to be made under oath, (5) in connection with an official proceeding, and (6) that the false statement was material. *See* TEX. PENAL CODE ANN. §§ 37.02-.03 (Vernon 1994). Specifically, the indictment alleged that appellant swore under oath in a July 9, 1993 court proceeding that he never appeared for a hearing on the annulment of his marriage. Thus, the State had to prove beyond a reasonable doubt that appellant appeared at the annulment hearing. This it failed to do.

The accused must be identified as the person who committed the offense. *McCullen v. State*, 372 S.W.2d 693, 695 (Tex. Crim. App. 1963). The burden is on the State in any criminal prosecution to prove beyond a reasonable

doubt that the accused committed the criminal act charged. *Id.; De La Paz v. State*, 161 Tex. Crim. 514, 279 S.W.2d 101, 102 (1955). Unless and until the State discharges this burden, the guilt of the accused is not shown.

In this case, the State relies solely on the reporter's record and docket sheet of the 1989 annulment proceeding to establish that appellant was present at the hearing and later lied about it under oath. However, there was no evidence adduced at trial to establish that the Abraham Nee Ntreh, identified in the reporter's record, is appellant. Not one witness identified him or testified that appellant was the person who was present at that 1989 hearing. The State did not call as a witness appellant's lawyer at that proceeding, and the court reporter testified that she could not identify appellant as the man who appeared in court. Although there was a tape recording, the State likewise did not present any expert testimony to establish that the voice on the tape was appellant's. We acknowledge that there was evidence that Ntreh wanted to end his marriage, had hired a lawyer to achieve that goal, and an official record shows that a man identifying himself as Abraham Nee Ntreh appeared and testified at an annulment hearing. Nevertheless, these circumstances, while certainly suspicious, are not sufficient to support a guilty verdict beyond a reasonable doubt. Rather, there must be some evidence to identify appellant as the man who appeared at the hearing. *See Hightower v. State*, 389 S.W.2d 674, 675-76 (Tex. Crim. App. 1965) (evidence insufficient in driving while license suspended case where no witness testified that person on trial was the identical person named in driving record or that he saw such person sign bond or traffic ticket included in driving

record or that either bore his signature); *McCullen*, 372 S.W.2d at 694-95 (in child sexual abuse prosecution, evidence insufficient when there was no evidence in record to identify the accused as party who committed offense); *De La Paz*, 279 S.W.2d at 102 (evidence insufficient in criminal libel prosecution when State presented the masthead of the newspaper showing name of publisher and the allegedly libelous newspaper article but did not offer evidence to identify the accused as publisher of newspaper); *Mayo v. State*, 156 Tex. Crim. 26, 238 S.W.2d 777, 778 (1951) (in prosecution for unlawfully practicing dentistry, evidence insufficient when State failed to produce evidence identifying the appellant as the person who took the impression for dental plates).

We find further support in this conclusion in the line of cases dealing with the sufficiency of the evidence to support findings on punishment enhancement paragraphs in indictments. In those cases, it is not enough that the name on the previous judgment is the same as that of the accused. To the contrary, in addition to this circumstance, the State must present independent evidence that the accused is the same person previously convicted. *See Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986); *see also Williams v. State*, 946 S.W.2d 886, 895 (Tex. App. – Waco 1997, no pet.); *Griffin v. State*, 866 S.W.2d 754, 756 (Tex. App. – Tyler 1993, no pet.). Likewise, the fact that the name of a witness in a court reporter's record is the same as the name of the accused is not enough. While it may be a circumstance *tending to prove guilt*, it fails to establish *appellant's* guilt beyond a reasonable doubt.

Reviewing the evidence in the light most favorable to the jury's verdict, we cannot conclude the State established beyond a reasonable doubt that appellant committed aggravated perjury. Accordingly, we sustain the first point of error to the extent it complains that the State did not prove that appellant was present at the annulment proceeding.

We reverse the trial court's judgment and enter a judgment of acquittal.

/s/ John R. Roach
JOHN R. ROACH
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

In The

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MARCIA M. WITTER and ARAHAM [sic], NEE NTREH	§	
Petitioners	§	5th Circuit CAUSE NUMBER 96-60335
Vs	§	
IMMIGRATION & NATURALIZATIONN [sic] SERVICE	§	
Respondent	§	

MOTION FOR RECALL OF MANDATE AND OR RELIEF UNDER FED. R. CIV.P. 60(b) AND FOR SUCH OTHER RELIEF AS MIGHT BE JUST

TO THE HONORABLE COURT:

Petitioners Marcia M. Witter (hereinafter, "Witter") and Abraham, Nee Ntreh (hereinafter, "Nee Ntrech") husband and wife, hereby move the honorable Court of Appeals for the Fifth Circuit for recall of its mandate in the above-mentioned cause and or relief under Fed. R.Civ. P. 60(b) and for such other relief as might be just, and respectfully show the Court as follows:

Summary

On December 7, 1998, the Texas Fifth District Court of Appeals at Dallas reversed and acquitted Nee Ntreh of

the State aggravated perjury charge regarding the annulment which also formed the primary basis, and substantially influenced this Court's May 30, 1997, opinion in Petitioners' case. (Pet. Exhibit A, State of Texas Court of Appeals December 1998 opinion, and Exhibit B, this Court's May 1997, opinion).

The State did not appeal and the State court of appeals mandate issued on February 25, 1995. (Pet. Exhibit C, State Court of Appeals February 1999 mandate).

Petitioners would show that, but for the perjury charge, neither the Immigration Judge (IJ) nor the Board of Immigration Appeals (BIA) would have found them deportable, and this court would not have affirmed the BIA's deportation order. (Pet. Exhibit D, Nee Ntreh's June 11, 1993 OSC, Exhibit E, Witter's June 11, 1993 OSC, Exhibit F, Witter's August 16, 1993 lodged charge, Pet. Exhibit G, Nee Ntreh's February 28, 1994 lodged charge). (Pet. Exhibit H, deportation hearing transcript, also contains IJ's oral decision pages 243-247, Exhibit I, IJ's August 29, 1995 written decision, and Exhibit J, BIA's April 29, 1996 decision).

Petitioners would also show that Immigration and Naturalization Service (INS) attorneys and agents committed fraud upon the Immigration Court, the BIA, and also on this Court because they unconscionably initiated the perjury charge and used it to influence the outcome of Petitioners deportation case.

I EVENTS LEADING TO THE PERJURY CHARGE AND ITS INFLUENCE ON THE DEPORTATION CASE

Although Nee Ntreh's perjury charge was not specifically included in the written factual allegations in the OSC and lodged charge in Petitioners respective case, it became inextricably part of the deportation case, the impetus, and primary basis for finding Petitioners deportable. A narrative and discussion of the written factual allegations and the findings of deportability in Petitioners' case show the following:

In Witter's case, based on the allegations stated in the OSC, only allegation No. 5 was relevant to the § INA 241(a)(1)(A), excludability charge under INA § 212(a)(19) in her case. Allegation No. 6, as a matter of law, did not constitute a violation under INA § 212(a)(19), to render excludability at the time of entry under INA § 241(a)(1)(A).

Allegation No. 5 in the OSC reads:

> You procured a visa for Abraham NEE-Ntreh by fraud or by Willfully misrepresenting a material fact, to wit: On November 17, 1989, before Thomas H. Lloyd, Vice Consul of the United States of America, American Embassy, London, England, you falsely swore on your Application for Immigrant Visa and Alien Registration, that Abraham Nee-Ntreh was your husband, knowing that your marriage to Abraham Nee-Ntreh was annulled on June 19, 1989 in the 256th Judicial District Court of Dallas County, Texas.

Allegation No. 6 in the OSC reads:

> On or about November 20, 1989, you knowingly encouraged, induced assisted, abetted or aided

> Abraham Nee Ntreh, an alien, to enter or try to enter the United States at or near Dallas, Texas.

In Nee Ntreh's case, based on the allegations stated in the OSC, only allegation No. 5 was relevant to the INA § 241(a)(1)(A) excludability charge under INA § 212(a)(19) in his case.[1]

> Allegation No. 5 in the OSC reads:
>
> You procured your *entry* by fraud or willfully misrepresenting a material fact, to wit: on 11-17-89 based on your marriage to Marcia Maureen Witter, which had been annulled on 06-19-89.

On October 18, 1993, Petitioners appeared before IJ Edwin Hughes for a deportation hearing. At that time, Petitioners presented both the IJ and the INS attorney a copy of a final judgement from the same Texas State court that entered the June 1989 annulment. It stated that the annulment order had been revoked in its entirety and to have no force or effect.

The following are highlights of some [sic] the questions and answers between the IJ and the attorneys in the October 1993 deportation hearing: (Hearing transcript 6-16).

JUDGE TO MR. JACOBS

"Q. All right. It's alleged by the Service that that entry was accomplished by virtue of fraud, based on the marriage to Marcia Witter.

---

[1] Allegation number 6 relating to the marriage fraud lodged charge under INA § 241(a)(1)(G)(ii) would be discussed infra.

JUDGE TO MR. HUNKER, INS attorney

"Q. What's the Government's position there? That there was a sham marriage or what is it?

"A. Part of our position is that the marriage had actually been annulled at that point.

JUDGE TO MR. JACOBS

"Q. All right, Mr. Jacobs relative to this allegation 5, you deny that?

"A. We deny.

"Q. You deny?

"A. Yes, sir.

"Q. What is your position basically, that the marriage was not annulled?

"A. We have a judgement – we filed a bill of review with the courts here which did away with any annulment that may have been entered wrongly . . .

JUDGE TO MR. HUNKER

"Q. All right. Have you been provided with a copy of this Texas court judgement concerning the annulment?

"A. Yes, judge, we have that, but that doesn't change the fact that at time of entry the marriage had been annulled, and there wasn't any judgement at that point.

JUDGE TO MR. JACOBS.

"Q. Well, this action setting aside that judgement, in the same fashion it held that the *annulment was invalid,* is that what happened?

"A. Yes correct.

JUDGE TO MR. HUNKER

"Q All right, I would be willing to aliow the Service a period of time to consider the effect of this judgement and possibly submit a brief."

"A Well, Judge . . . we have a number of witnesses we're going to call . . . when they entered they had an annulment, and they *knew about the annulment."*

JUDGE TO MR. JACOBS

"A And we *dispute that even knew about the annulment".*

JUDGE TO MR. JACOBS AND MR. HUNKER

"Q. Well, before we go any further with this or even have an evidentiary hearing, I'd like briefs to be submitted relative to this final judgement and what effect it has."

JUDGE TO MR. JACOBS

"Q. Well, what is your position relative to the Government's suggestion that the cases be consolidated?

"A. We would just as soon leave this on here and let the Government go forward in the other case.

JUDGE TO MR. HUNKER

"Q. Well, if it's necessary to have a case in which the parties appear and submit evidence, I might be inclined to go along and put the cases together. But if it's a *matter of law* and they were married at the time of the entry, then it's – that's the point I'm trying to get to its what effect of this final judgement of the 256 Judicial District Court of Texas granting an original bill of review at setting aside the annulment."

"A. Judge, since Judge Burkholder has decided to take the case, we still think the best course of action would be to put it on his docket . . .

JUDGE TO MR. JACOBS

"A. My opposition is that this final judgement on its face says that this couple was married. That when they said they were married, they were married for all purposes since that time; therefore, the entry was valid and that these proceedings can be terminated.

JUDGE TO MR. JACOBS AND MR. HUNKER

"Q. We'll consider the case reset for the Master Calendar docket on November 12 at 1:00. At that time, I really don't anticipate conducting a hearing in which parties would appear. I'm just going to put it on the calendar and tell you at that time I probably will already have a decision rendered . . .

"Q. The case stands on the motion to terminate, and we'll consider the briefs, and then I'll render a decision on the motion to terminate . . .

As stated in the OSC, the sole basis the INS initiated deportation proceedings against Petitioners was because of the June 1989 annulment order. In addition, the INS's subsequent allegation that Petitioners *knew* or were *aware* that their marriage had been annulled was also solely based on the June 1989 annulment order. Therefore, *absent the annulment order* the INS had no independent claim or basis against Petitioners.

In this case, the same Texas state court that entered the annulment order found that under Texas law the order should not have been entered, essentially, because neither of the Petitioners was present for an annulment proceeding. For that reason, the State court revoked the annulment order in its entirety and to have no force of effect.

Thus, the IJ moved to terminate Petitioners deportation case because no further grounds existed for the deportation proceedings to continue, as a matter of law. See, Matter of Astorga, 17 I & N Dec. 1 (BIA 1979) (holding that the general principle is that the validity of a marriage for immigration purposes is governed by the law of the place where the marriage is celebrated). Also compare e.g. *Brown v. Apfel,* ___ F.3d ___, 1999, Case No. 97-60436 (5th Cir. January 6, 1999) (holding that the Social Security Administration did not satisfy the strenuous proof Mississippi law requires to establish the invalidity of a second marriage). Also ccompare [sic] *Wilkerson v. United States of America,* ___ F.3d ___ 1995, Case No. 94-40713 (5th Cir. October 23, 1995) (stating " . . . The IRS agents lacked any knowledge concerning Texas marriage law, and acted without ever consulting an attorney on the subject . . . "); *Swate v. Hartwell,* ___ F.3d ___, 1996, Case

No. 96-20251, 96-20252 (5th Cir. November 21, 1996). Holding,

> . . . . An inquiry of the sort urged by the husband would put federal courts in the position of modifying the matrimonial decrees of state courts, thus interfering with the delicate state systems for dealing with the dissolution of marriages and the difficult and complex results that flow therefrom. . . . *State-crafted* family law mechanisms should not be disturbed by federal court intervention unless there is an unmistakable mandate from congress to do so in order to achieve a valid federal objective. We find no such mandate here . . . *We conclude that the state court, not the bankruptcy court,* is the proper forum in which to consider the "excessiveness" of the alimony obligations imposed by the final decree . . .

After filing motions as directed by the IJ to terminate the proceedings, Petitioners attorney and the INS attorney appeared for a hearing before the IJ in or about mid November 1993. Petitioners did not attend this hearing. The following are the highlights of some the questions and answers between the IJ and the attorneys from that hearing. (Hearing transcript pages 17-25).

JUDGE TO MR. JACOBS

"Q. Mr. Jacobs have you seen the material the Service has filed.

"A. Yes, Your Honor.

"Q. Essentially a transcript – it seems to me the most important thing.

"A. . . . And I also spoke with the judge."

"Q. You're talking about the district judge who wrote this letter . . . ?

"A. Yes. She indicated to me . . . That the grant of the *bill of review still stands.*

"Q. She can't issue a contempt citation?

"A. No.

"Q. She made a complaint to the *district attorney – did the district attorney* or *grand jury made any accusations*?

"A. I understand that she has made a complaint to the district attorney, and nothing further has come from that yet, but that was just recently.

JUDGE TO MR. BURK, INS attorney

"Q. Is she in position to testify about what happened the first time?

"A. I'm not sure your, Your Honor.

JUDGE TO MR. JACOBS

"Q. Is it the same judge?

"A. Different Judge

JUDGE TO MR. BURK

"A. I'm not handling the case. It would be *Mr. Reynolds.*

JUDGE TO MR. JACOBS

"Q. Does she know who made an appearance and testified at first hearing?

"A. No – at which hearing? At the very beginning?

"Q. When they got the annulment.

"A. No. The allegation, of course, is that –

"Q. That it's the respondent.

"A. The transcript says, of course, that it was him, and he denies that he did. She did not sign off on that. That was Judge Koons. . . .

"Q. Well, my ruling today would be that the motion to terminate cannot be granted. I think that's particularly because of the apparent dispute of fact that arises when one reads the two transcripts in which the respondent says that he did not appear at the annulment proceedings, and then the transcript of that proceedings which suggests that he did – or somebody did . . .

"Q. – give these Texas judgements that kind of finality . . . I think we would need a hearing to determine the factual dispute.

JUDGE to MR. JACOBS

"Q. Well, who is he married to now?

"A. He's still married to the same woman.

"Q. Marcia Witter?

"A. Yes.

"Q. On what grounds are they seeking her deportation?"

"A. The same thing.

JUDGE TO MR. BURK

"A. Aiding and abetting.

So far, a deportation hearing which, as a matter of law, should have been terminated never, happened, and although the INS did not offer any additional evidence or testimony the IJ continued the deportation proceeding.

On November 26, 1993, some two weeks after the deportation hearing, Nee Ntreh received a Dallas County Grand Jury letter stating that a 3rd degree State aggravated perjury charge was going to be considered against him on November 30, 1993. (Pet. Exhibit K, Dallas County Grand Jury November 1993 letter).

On December 3, 1993, three days after the Dallas County Grand Jury hearing, INS District Counsel *James T. Reynolds* informed the Immigration court that Nee Ntreh was expected to be indicted on a *related criminal matter.* As a result, the INS requested Petitioners case to be consolidated and continued and set for March 1994. (Pet. Exhibit L, INS December 1993 motion to consolidate).

On December 12, 1993, a Dallas County Grand Jury charged Nee Ntreh with aggravated perjury based on his representation in the bill of review hearing that he was not present at an annulment proceeding.

On February 28, 1994 the INS filed an additional charge against Nee Ntreh under INA § 241(a)(1)(G)(ii) in which it included allegation No. 6. It stated: "You failed or refused to fulfill your marital agreement with Marcia Maureen Witter, which was entered into for the purpose of procuring your entry as an immigrant." (Refer to Pet. Exhibit G).

Marriage fraud under INA § 241(a)(1)(G)(ii) provides as follows:

> An alien shall be considered to be deportable as having *procured a visa* or other documentation by fraud (within the meaning of INA § 212(a)(19) [212(a)(6)(C)(i))]) and to be in the United States in violation of this Act (within the meaning of subparagraph (B)) if –
>
> (ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfil the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's *entry as an immigrant.*

In or about mid March 1994 Petitioners appeared for another deportation hearing before IJ Hughes. As a direct and approximate result of Nee Ntreh's perjury charge Mark Jacobs withdrew as Petitioners counsel due to conflict of interest. The IJ at this time consolidated Petitioners case although Mr. Jacobs had previously opposed consolidation of the cases because of the differences in the allegations and the INS's burden of prove in each case. (Hearing transcript pages 12 and 21).

The following are highlights of some of the questions and answers between the IJ and the INS attorney in the March 1994 hearing: (Hearing transcript pages 26-36).

JUDGE TO MR. JACOBS

"Q . . . The Judge that granted the annulment wrote a letter dated October 21, 1993, and Mr. Jacobs filed a brief on November 9, 1993 . . . Mr. Jacobs . . . in your, brief you said several times that this gentlemen didn't know anything about the annulment. Yet it's quite evident that

he *appeared and testified* in support of the annulment, *the Judge sent a letter saying she never would have set the case aside in October . . .*

JUDGE TO MR. HUNKER

"A. Judge, one of the reasons that the Service wanted to continue it is to allow for the criminal courts to finish the matter involving Mr. Ntreh. The prehearing is set for April 1, so I think you need some more time to make sure the criminal matter is resolved before we go to hearing because the criminal matter has *direct bearing* on the allegations that the Service is making about it.

"Q. All right. As I understand it – I don't know exactly what the charge is, but, for example, the perjury charge, and he's acquitted, that has no bearing on this."

"A. That's correct. But, Judge, if he is convicted, then the Court on principles of res judicata would have to accept the –

"Q. Res judicata wouldn't apply. His prosecution . . . is between him and the state.

"A. Wouldn't this Court have to find that he did commit perjury in its proceedings?

"Q. But that's done on a completely different standard of proof. It's not beyond a reasonable doubt.

"A. Well, perjury – our standard – our burden of proof is different – less than beyond a reasonable.

"Q. That's right.

"A. So if he is found to have *committed perjury,* then necessarily this Court would have to find in the *immigration proceedings* that he did *commit perjury.*

"Q. But we still have the matter relative to her.

"A. Well, she is related to this.

"Q. And she's not accused – I don't know if she's accused of giving perjury in reference to a judgement rendered by the Texas court. You've accused her of lying to the visa-issuing authorities. That's completely different matter. It wouldn't be relevant to the state prosecution at all.

"A. Well, Judge, I think it is relevant because –

"A. Judge, again, I want to stress that I think we're going to be wasting our time on the 25th if this criminal matter isn't resolved. It would save the resources and time of this Court if we continue it for another month or so that the criminal matter will be resolved.

On May 18, 1994, the IJ found Petitioners deportable as charged. The IJ provided no linkage, however, between his decision and the written factual allegations in the OSC or lodged in Petitioners respective case, as required by law, but rather on the basis of the INS's allegation that Petitioners were aware that their marriage had been annulled. Here, the State's perjury charge that Nee Ntreh was present in an annulment hearing and lied about it under oath necessarily became conclusive in the deportation proceedings that the INS met its burden on its allegation.

Looking at the written factual allegations, however, to find that New Ntreh *obtained his visa by fraud* the IJ

must have specifically found that the INS proved allegation No. 6 regarding the marriage fraud charge by evidence that was clear, unequivocal and convincing. See, *Matter of M –*, 7 I&N Dec. I&N 601 (BIA 1957); Matter of Mietus, 11 I & N Dec. 684 (BIA 1966; *Kokkinis v. INS*, 429 F.2d 938 (2nd Cir. 1970); and *Matter of Matti*, 19 I&N Dec. 43 (BIA 1984).

Thus, a *fortiori*, the written factual allegations indicate that absent a finding of deportability on the marriage fraud charge the remaining written allegations against Petitioners could neither be sustained, as a matter of law, and the deportation case should have been terminated. Nonetheless, because of the substantial influence of the perjury charge regarding the annulment this significant legal event made no difference in the IJ's findings of deportability. See, *In re Amaya-Castro*, Interim Decision (BIA) 3329, (August 23, 1996) (holding that because the Immigration Judge's finding of deportability is not based on clear, unequivocal, and convincing evidence that the *facts alleged as grounds* for the respondent's deportation are true, that finding is not valid.."); In *re A-P-*, Interim Decision (BIA) 3375, (January 26, 1999) (stating " . . . we expect even these abbreviated decisions to link the *admitted factual allegations* to the section or sections of the Act which determine the respondent's removability . . . "), and see also *Woodby v. INS*, 385 U.S. 276 (1966).

On appeal, the BIA noticed the errors in the IJ's decision as explained above and in May 1995 remanded Petitioners case to the IJ. (Exhibit M, BIA's May 2, 1995 decision). The BIA noted at page 2 of its decision in part, as follows:

> . . . . Upon a review of the decision we note that *while* the Immigration Judge found the respondents deportable, he did not *specifically* find whether each respondent was deportable on the *Respective lodged charge*. . . .

After the remand, the IJ issued a written decision on August 29, 1995 consistent with his May 1994 oral decision and again found Petitioners deportable. In the heading, at page 1 of the decision the IJ listed INA § 241(a)(1)(A) as the sole charge of deportability for both Petitioners and "(1) *Obtaining visa by fraud* and (2) *assisting another to obtain visa by fraud*" as supporting factual allegations to the charge. Even so, both items 1 and 2 would only relate to the respective lodged charge, which the IJ still did not make specific findings as directed in the BIA's May 1995 opinion.

Furthermore, as a matter of law, a finding of deportability under *INA § 241(a)(1)(A)* requires a charge(s) of "excludability", i.e. the INA § 212(a)(19) charge in Petitioners respective case, and the INA § 212(a)(6)(E)(i) in Witter's case regarding her lodged charge. These charges in turn must be supported by the written factual allegations, which would not have been possible because the marriage fraud charge was not sustained. See *Matter of Rocha*, 20 I&N Dec. 944 (BIA 1995) (stating " . . . the immigration judge terminated the deportation proceedings, concluding that the Service could not use the "excludable at entry" charge to support an order of deportation where the respondent had not been convicted of a controlled substance offense"). See also, *Matter of Grinberg*, 20 I&N Dec. 911, 912 (BIA 1994) citing INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). (Holding that

the express inclusion of language in one clause or provision of the statute and its absence or exclusion in another clause or provision is to be given effect).

Also, at page 1 of the written decision, the IJ stated: " . . . Now the INS says that a Texas Court's 1993 Bill of Review which facially annulled the annulment was obtained by *false testimony* and it should be ignored in this proceedings". At pages 7 and 8 of the written decision the IJ concluded his findings of deportability in pertinent part as follows:

> . . . The question here related to Ms. Witter is whether she aided and abetted Mr. Netreh to enter the United States without being married in November 1989. Since their annulment was in June 1989. I cannot possible conceive of her *not knowing of the annulment* and his true marital status. She assisted him in entering the United States by fraud . . . As to him, I think there is no doubt of his obtaining his visa and entry into the United States by fraud; none whatsoever. And his attempt to cover up this fraud has now led to his *indictment for perjury* . . . without question *Mr. Ntreh knew he got the annulment,* even when he *lied about it to Judge Lytle* . . . The very best evidence of his knowledge about the annulment is contained in the transcripts of the annulment proceeding and the transcript of the proceedings before Judge Lykes that resulted in her granting the Bill of Review and there annulling the 1989 annulment – in 1993. Even had he testified . . . in his heart of hearts . . . I would not believe him . . .

On April 29, 1996, a different BIA panel rendered a second decision in Petitioners case and found them

deportable and dismissed their appeal. At page 1 of its decision the BIA stated that the IJ found Petitioners deportable under INA § 241(a)(1)(A) for being excludable at time of entry under INA § 212(a)(19). The BIA did not state on what basis, however. Essentially, the BIA adopted the IJ's conclusion that Petitioners *knew* that their marriage had been annulled.

At pages 7 and 8 of its decision the BIA agreed that the IJ's statements that Nee Ntreh was not worthy of believe [sic] regarding matters unrelated to the annulment were not probative of whether Petitioners "obtained immigration benefits by fraud or by willfully misrepresenting a material fact (their marital status)". Regarding the annulment the BIA noted:

> . . . The purpose of such policy has been to avoid manipulation of immigration priorities through changes in marital status not undertaken in good faith . . . We point out that we have applied the relation back doctrine only where to do so would bring about a more just result. We distinguished *Matter of Astorga* . . . in which we held that a declaration of invalidity related back for immigration purposes where no fraud, misrepresentation, or manipulation of the immigration laws had been alleged . . . Given the respondents' misrepresentations, we find that justice would be better served by not relating back the court order cancelling the respondents' annulment for immigration purposes . . . (BIA dec. 11-12)
>
> . . . . We find that the respondents were both aware at the time of their November 1989 consular interview that the marriage on which the male respondent's application for immigrant

> visa was based had been annulled several months earlier . . . The record establishes by clear, unequivocal, and convincing evidence that the respondents willfully misrepresented a material fact, their marital status, to a consular officer in order to procure an immigrant visa for the male respondent. Accordingly, the respondents are deportable under section 241(a)(1)(A) of the Act as aliens who were excludable at entry under section 212(a)(19) of the Act . . . (BIA dec. 17).

Regarding the marriage fraud charge the BIA stated:

> . . . Because we have found the male respondent deportable under section 241(a)(1)(A) of the Act as an alien excludable at entry under section 212(a)(19) of the Act and because the Service has apparently decided not to pursue the charge of deportability under section 241(a)(1)(G)(ii), as it has not addressed this charge of deportability in its appeal brief or objected to the Immigration Judge's failure to find the male respondent deportable on this charge, we will not further consider this charge of deportability on appeal . . . (BIA dec. 18)

As noted above, the only reason the INS did not address the marriage fraud charge in its appeal brief and the IJ did not specifically find Nee Ntreh deportable on this allegation was because not ONE evidence or testimony adduced during Petitioners deportation proceedings would have supported such finding. Even so, the Immigration Judge listed the marriage fraud charge in his memorandum of oral decision to show that Nee obtained his permanent resident visa by fraud as that charge assigned, although without a specific finding. (Pet.

Exhibit N, IJ's May 18, 1994 memorandum of oral decisions relating to the marriage fraud lodged charge). Moreover, the BIA reviewed Petitioners record de novo and it could found Nee Ntreh deportable on this charge if it were sustainable.

The foregoing do show that both the IJ and the BIA in finding Petitioners deportable completely ignored the written factual allegations that only if sustained, should be the basis for Petitioners deportability, as a matter of law. However, the fact that Nee Ntreh had already been charged by the State regarding the annulment became the overriding factor and impetus for both the IJ and the BIA to find Petitioners deportable.

On May 30, 1997, this Court affirmed the BIA's order of deportation. *Witter v. INS*, 113 F.3d 549 (5ths [sic] Cir. 1997). At page 551 of its opinion, the Court stated:

> . . . At that time, Petitioners filed a petition in Texas state court seeking to set aside the 1989 annulment order. Petitioners alleged that they never intended to complete the annulment and only recently discovered that an order annulling their marriage had been issued. Nee Ntreh testified that he did not attend the original annulment hearing and that he and Witter had never lived apart. The state court set aside the annulment based on Petitioners' representations. *However, the State subsequently charged Nee Ntreh with perjury based on his representations regarding the annulment* . . .

This Court dismissed the marriage fraud lodged charge against Nee Ntreh, and also found that the " . . .

statute [INA § 212(a)(19)] *requires* that the willful misrepresentation be *material* to procurement of a visa . . . and neither the IJ or the Board decision addresses the question . . . " *Witter v. INS*, supra at 552, 554

II WITHOUT THE PERJURY CHARGE PETITIONERS WOULD NOT HAVE BEEN FOUND DEPORTABLE

The essence of the INS's case against Petitioners by the time the deportation hearing concluded was that Petitioners were not *credible* on anything regarding the annulment, and the INS achieved this goal primary [sic] on the basis of the perjury charge. On this basis, the INS necessarily bolstered its allegation that Petitioners were *aware* that their marriage had been annulled. Compare e.g. *America v. Filani*, ___ F.3d ___, 1996, Case No. 95-1051 (2ndCir. January 11, 1996).

This is further explained by the fact that unlike the perjury trial the INS during the deportation hearing did not call Judge Lykes, the court reporter whose transcript they relied on to show that Nee Ntreh was present in an annulment proceeding. In addition, on cross-examination during the perjury trial INS Agent Heaton said as part of his investigation, he did not talk to Mr. Sinzinger, or to the judge who signed the original annulment order. (Texas Court of Appeal opinion page at 3). See Klapprott v. United States, 335 U.S. 601 (1949) stating:

> . . . . the complaint in the denaturalization proceeding strongly indicates that the Government here is proceeding on inadequate facts, just as it did in the criminal cases it brought against petitioner. *For if the government had been able on a trial*

> *to prove no more than the particular facts it alleged in its denaturalization complaint, it is doubtful if its proof could have been held sufficient to revoke petitioner's citizenship* . . . Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing . . . [335 U.S. 601, 613].

In affirming the BIA's order of deportation this Court found that although the State court revoked the annulment order "however, the State subsequently charged Nee Ntreh with perjury based on his representations regarding the annulment". Indicating that the perjury charge was material and primary basis for this Court's opinion in Petitioners deportation case.

In *Matter of Astorga,* supra, which the BIA and this Court cited in their opinions, the beneficiary in that case in statements previously made to the INS had contended that he and his purported first wife were married. Thus, when the petitioner submitted a visa petition on behalf of the beneficiary, a question arose as to the dissolution of his first marriage in Mexico. For this reason, the INS district director denied the petition. The petitioner then submitted an affidavit from the beneficiary that he had not previously been married, including other statements and one from the beneficiary's purported first wife that he had not previously been married. The district director found the evidence submitted self-serving, not credible, and not sufficient to overcome the prior information

given by the beneficiary and his alleged first wife. On appeal to the BIA, the petitioner submitted a copy of an order issued by a Washington state court declaring the beneficiary's prior marriage in Mexico as invalid from its inception. For this reason the BIA remanded the case to the District Director to consider this evidence. The District Director after considering the Washington State court order declaring the beneficiaries alleged prior marriage invalid from its inception found it unpersuasive. The BIA approved the visa petition and in pertinent part stated as follows: Matter of Astorga, supra pages 2-5

> . . . Since we also find that the letters and statements of the beneficiary are self-serving and weak evidence in the fact of the previous information provided, we will focus on the *Declaration of Invalid Marriage* as the major piece of evidence presented by the petitioner to *prove the validity of his present marriage* . . . it should also be noted that this result is consistent with the general principle that the *validity of a marriage for immigration purposes is governed by the law of the place where the marriage is celebrated* . . . It is clear that the State of Washington would *recognize the present marriage as valid* . . . By his first marriage, the beneficiary did not evade the immigration law and there is no indication in the record that the present marriage is anything other than *bona fide* . . .

Also, in *Matter of Castillo-Sedano,* 15 I & N Dec. 445 (BIA 1975), cited in Astorga, supra, the applicant in that case was referred by the Service for an exclusion proceedings because his marriage to a United States citizen had been *annulled* by a State of California court order. The INS contended that the applicant's marriage to a United

States citizen was fraudulent and that he was therefore excludable *under INA § 212(a)(19),* among other charges. The applicant testified at hearing but his former wife did not. On the basis of the evidence adduced at the hearing, the IJ terminated the hearing and ordered the applicant's admission to the United States. Among other things, the IJ found that the judgement of nullity of the applicant's marriage was a default order and that it should not be considered adjudication on the merits that the marriage was fraudulent. The IJ also found that the annulment was obtained for some other cause unrelated to evasion of the immigration laws. The INS appealed the IJ's order. The BIA adopted the IJ's opinion and dismissed the INS's appeal.

Consequently, Nee Ntreh's *acquittal* on the perjury charges by the Texas State court of appeals does establish a basis for this Court to recall its mandate, vacate, and set aside the BIA's order of deportation in Petitioners case. In addition, the acquittal on perjury charge makes this Court's opinion in Petitioners incongruent. See *United States v. Tolliver,* ___ F.3d ___, 1997, Case No. 93-3873 (5th Cir. July 1, 1997).

Petitioners have also shown that the perjury charge, which Nee Ntreh should not have been charged substantially, influenced this court's opinion in their case and must therefore be recalled, and the BIA's deportation order vacated and set aside. Compare *Fiswick v. United States,* 329 U.S. 211 (1946) stating:

> . . . if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the

> error, *it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had *substantial influence.* If so, or if one is left in grave doubt, the conviction cannot stand.' . . . Moreover, other disabilities or burdens may flow from the judgment, improperly obtained . . . He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but not yet shown to have committed it . . . [329 U.S. 211, 218, 233]

III. INS ATTORNEYS AND AGENTS COMMITTED FRAUD UPON THE COURT

Upon learning the impending termination of Petitioners deportation case INS attorneys and agents conspired with Texas state officials and had Nee Ntreh charged with perjury regarding the annulment. The INS then used the perjury charge to substantially influence the outcome of Petitioners deportation case, which otherwise would have been terminated, as a matter of law. (See deportation hearing transcript pages 6-36).

First, INS attorneys and agents under highly prejudicial circumstances without Petitioners or their attorney present contacted Judge Sue Lykes who granted Petitioners bill of review and revoked the annulment order. After the meeting, Judge Lykes wrote a disparaging letter

and discredited Petitioners and their attorney regarding revocation of the annulment order. The letter, which was addressed to James T. Reynolds; INS district counsel in Dallas, was then sent to the IJ who handled Petitioners deportation case. (Pet. Exhibit O, Judge Lykes October 21, 1993, letter).

Shortly thereafter, the INS through the Dallas County District Attorney (DA)'s office had Nee Ntreh charged with perjury regarding the annulment without any realistic expectation or intention to secure a valid conviction but solely to influence and subvert the deportation proceedings in Petitioners' case.

Among other things, although the State charged Nee Ntreh with perjury on December 12, 1993, the Dallas County DA's office practically waited for almost six months until completion of Petitioners deportation hearing to see what information it could find to prove its case against Nee Ntreh.

On June 1, 1994, less than two weeks after Petitioners had been found deportable under and through the influence of the perjury charge, the Dallas County DA's office with Petitioners' Alien Registration Numbers provided to them by the INS served a subpoena and affidavit upon the IJ demanding a transcript of Petitioners' deportation hearing. (Pet. Exhibit P, June 1, 1994 DA's office subpoena and affidavit requesting transcript of the deportation hearing).

On June 30, 1994, the Immigration Judge's office in Dallas complied with the subpoena by providing the requested transcript, and tapes of Petitioners hearing. (Pet. Exhibit Q, Immigration court's June 30, 1994 letter

confirming transmission of the transcript to the DA's office).

Unsuccessful for the Dallas county DA's office, not ONE witness testified during Petitioners deportation hearing of his or her knowledge that Nee Ntreh was *present in an annulment proceedings* or that Petitioners were *aware* that their marriage had been annulled prior to Nee Ntreh's immigrant visa application. For this reason, and for lack of sufficient evidence to prove the perjury charge, the Dallas County DA's office did not pursue the perjury charge further.

After several special set-trial dates and continuances without any success in bringing the perjury case to trial Nee Ntreh filed a speedy – trial motion in March 1996. Soon thereafter, the case was brought to trial. (Pet. Exhibit R, Nee Ntreh's March 1996 speedy – trial motion).

In a desperate attempt to cover up for the conspiracy regarding the perjury charge and to further subvert the integrity of both the State criminal, and the deportation process the INS on October 28, 1997, deported Petitioners from the United States to England while the perjury charge was still pending. (Pet. Exhibit S, Petitioners October 28, 1997, deportation papers). An obvious disregard and violation of both State and Federal statutes, and Petitioners due process and equal protection guarantees under the United States constitution.

INA § 241(a)(4)(A) provides:

> IN GENERAL. – Except as provided in section 343(a) of the Public Health Service Act (42 U.S.C. 259(a)) and paragraph (2), the Attorney General *may not remove an alien who is sentenced*

> *to imprisonment until the alien is released from imprisonment.* Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

INA § 241(a)(4)(B) provides:

> (ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 101(a)(43)(C) or (E), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that alien be so removed.

On October 29, 1997, one day after Petitioners deportation, the 282nd Criminal Judicial District Court in Dallas, Texas issued a warrant for Nee Ntreh's arrest because he breached his criminal appeals bond when he was no longer in the United States. (Pet. Exhibit T, State criminal court October 29, 1997 arrests – warrant).

On November 3, 1997, the INS again through the Dallas County DA's office filed a motion with the State court of appeals in Dallas to dismiss Nee Ntreh's criminal appeal regarding the perjury charge because he fled the country, although he was in fact deported. The State court of appeals denied the State's motion. (Pet. Exhibit U, State's November 1997 motion to dismiss appeal on perjury case, and Exhibit V, State court of appeals November 1997 denial of the State's motion).

The end result of this was unconscionable scheme by INS attorneys and agents amounting to fraud upon the Immigration court, the BIA, and this Court that substantially influenced an impartial administrative and judicial process regarding Petitioners deportation case. Under these facts, Nee Ntreh's acquittal on the perjury charge also establish an independent basis for this Court to recall its mandate, set aside and vacate the BIA's deportation order in Petitioners case, as a matter of law. See, Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 245-250, 64 S. Ct. 997, 1001, 1003, 88 L.Ed. 1250 (1944) (Stating, . . . here even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of appeals. . . . Proof of the scheme, and of its complete success up to date, is conclusive . . . The trial of fraud continued without break through the District Court and up to the Circuit Court of appeals.).

Furthermore, by unlawfully deporting Petitioners while Nee Ntreh's perjury charge was still pending that INS made it impossible and deprived Petitioners of any meaningful opportunity to reopen their deportation case with the BIA as a result of Nee Ntreh's acquittal on the perjury charge. See C.F.R. § 3.2(d).

In addition to the Supreme Court precedents cited above, this Court has held that an alien whose claim arises from INS misconduct during an exclusion proceeding, for instance, may be able to invoke the Court's jurisdiction despite § 1252(g), but because that error may in fact impugn the validity of the underlying proceeding. See *Humphries v. Various Fed USI N S.*, ___ F.3d ___, 1999,

Case No. 96-10383, footnote 11 (5th Cir. January 21, 1999). See also *Singh v. Walters*, ___ F.3d ___, Case No. 95-15943 (9th Cir. June 24, 1996); *Mejia-Ruiz v. I N S*, ___ F.3d ___, Cause No. 94-4163 (2nd Cir. April 4, 1995), citing, Baez v. INS, 41 F.3d 19, 25 (1st Cir. 1994). (Stating . . . a court might maintain jurisdiction in the exceptional case of "knowingly unlawful deportation by the INS for the specific purpose of shortstopping an alien's right to review . . . ").

IV. CONCLUSION

(1) Nee Ntreh's acquittal on the perjury charge proves that the INS improperly used the perjury charge to influence and subvert Petitioners deportation proceedings, and among other things, committed fraud upon the Immigration court, the BIA, and this Court. (2) The INS violated both state and federal statutes when it unlawfully deported Petitioners from the United States to cover up for the conspiracy regarding the perjury charge for which Nee Ntreh should been charged. (3) As a direct and approximate result of the unlawfulness of Petitioners deportation from the United States; among a number of things, Petitioners continue to be deprived of a lawful permanent status in the United States, and other property and liberty interest in violation of their due process and equal protection guarantees under the United States constitution. (Pet. Exhibit W, copy of Petitioners I-551 alien registration receipt – card, issued to them in February 1990). To this day, virtually all of Petitioners personal belongings still remain in Dallas, Texas.

WHEREFORE, PREMISES CONSIDERED, and for the reasons stated above, Petitioners pray this honorable Court in the interest of justice to recall its mandate issued in the above-referenced case, vacate and set aside the BIA's order of deportation, and or grant them relief under the Fed.R.Civ.P. 60(b) and for such other relief as might be just.

Respectfully submitted,

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Date: May 26, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60335

MARCIA M WITTER; ABRAHAM NEE NTREH

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Jul 16, 1999)

Before DAVIS, EMILIO M. GARZA, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of petitioners to recall the mandate and for relief under the Fed R. Civ. P. 60(b), is denied.

IT IS FURTHER ORDERED that the motion of petitioners to vacate the order of deportation of the Board of Immigration Appeals, is denied.

IT IS FURTHER ORDERED that the motion of petitioners to set aside judgment, is denied.

IT IS FURTHER ORDERED that the motion of petitioners to file in excess pages the motion to recall the mandate, is denied.

IT IS FURTHER ORDERED that the motion of petitioners for appointment of counsel, is denied.

Supreme Court, U.S.
FILED
OCT - 1 1999
CLERK

No. 99-560

In the Supreme Court of the United States

MARCIA M. WITTER AND ABRAHAM NEE NTREH,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion by refusing to recall its mandate in petitioners' case.

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In the Supreme Court of the United States

No. 99-560

MARCIA M. WITTER AND ABRAHAM NEE NTREH,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioners' motion to recall the court's mandate (Pet. App. 80a-81a) is unreported. That court's earlier opinion on the merits (Pet. App. 1a-16a) is reported at 113 F.3d 549. The opinion of the Board of Immigration Appeals is unreported, as is the opinion of the Immigration Judge (Pet. App. 17a-35a).[1]

[1] The opinion of the Board of Immigration Appeals, which the court of appeals affirmed, is not reprinted in the appendix to the petition. For the Court's convenience, we have lodged a copy of the Board's opinion with the Clerk.

JURISDICTION

The order of the court of appeals denying the motion to recall its mandate was entered on July 16, 1999. The court's judgment on the merits was entered on May 30, 1997. The petition for a writ of certiorari was filed on September 30, 1999, and is therefore jurisdictionally out of time with respect to the second question presented by the petition (see Pet. i). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Witter is a native of Jamaica and a citizen of the United Kingdom. Pet. App. 2a. Petitioner Abraham Nee Ntreh is a native and citizen of Ghana. Both initially entered the United States legally, and the two were married in Dallas, Texas, in August 1988. In May 1989, Nee Ntreh filed a petition for annulment, alleging that Witter had fraudulently induced Nee Ntreh to marry her, that the couple had never lived together, and that they had never consummated the marriage. Witter signed a waiver of notice in which she swore that she had read and understood the annulment petition, and agreed that the petition could be considered by the court without further notice to her. A transcript of the annulment hearing indicates that Nee Ntreh appeared and testified at the proceeding. The court granted the annulment and sent a copy of the order to Witter at the address provided in the waiver. *Ibid.*

Petitioners both left the United States. Five months after the annulment was granted, petitioners applied for new immigrant visas at the United States embassy in London, representing that they were married and presenting their 1988 marriage certificate as evidence to that effect. They did not disclose that the marriage

had been annulled. Witter was accorded preference for entry based on her employment as a nurse in Dallas, and Nee Ntreh's application was granted because he was Witter's spouse. Pet. App. 2a-3a.

2. In June 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioners under what were then Sections 241(a)(1)(A) and 212(a)(6)(C)(i) of the Immigration and Nationality Act, see 8 U.S.C. 1251(a)(1)(A) and 1182(a)(6)(C)(i) (1994), on the ground that they had willfully misrepresented a material fact in order to obtain petitioner Nee Ntreh's visa. Pet. App. 3a. The INS also alleged that petitioner Witter was deportable because she had aided and abetted Nee Ntreh's illegal entry, and that Nee Ntreh was deportable for engaging in marriage fraud. *Id.* at 3a-4a.

Petitioners then asked a Texas court to set aside the 1989 annulment, alleging that they had never intended to complete the annulment, and that they had only recently discovered that an annulment order had been entered. Pet. App. 4a. Petitioner Nee Ntreh testified that he did not attend the original annulment hearing, and that he and Witter had never lived apart. Based on those misrepresentations, the state court set aside the annulment. Texas authorities later charged Nee Ntreh with perjury based on his testimony concerning the annulment. *Ibid.*[2]

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[2] Nee Ntreh was convicted of aggravated perjury for having testified falsely, in the proceeding to set aside the annulment, that he had not appeared at the hearing in the original annulment proceeding. See Pet. App. 36a, 43a. A state appellate court reversed that conviction (*id.* at 47a) on the ground that, although the reporter's record and docket sheet for the original proceeding "reflected that a person who identified himself as Abraham Nee Ntreh" appeared and testified at the annulment hearing (*id.* at

After conducting an evidentiary hearing, an Immigration Judge (IJ) ordered petitioners deported. Pet. App. 17a-35a. The IJ found that petitioners were not married at the time of their visa interview in London in November 1989, because the 1988 marriage, if it was ever valid, had been annulled before the interview took place. *Id.* at 27a-28a; see also *id.* at 29a-30a. Having noted that both petitioners repeatedly claimed to be single after the 1988 marriage, after the 1989 annulment, and after the annulment was set aside in 1993 (*id.* at 28a), and that they "referred to each other at various times as being merely friends, cousins, siblings, other relatives, an accountant, anything but husband and wife for the most part during that whole period" (*ibid.*), the IJ rejected (*id.* at 30a-32a) petitioners' claim that, notwithstanding the annulment, they were parties at the time of their visa interview to a "common-law marriage" under Texas law. The IJ found that there was "no doubt * * * whatsoever" (*id.* at 29a) that Nee Ntreh obtained his visa fraudulently by knowingly misrepresenting his marital status." See *id.* at 29a-30a, 32a. Although he considered the evidence against petitioner Witter "slightly less clear," the IJ found that her testimony was "not credible * * * about anything related to her relationship to [petitioner] Ntreh," and that "she did assist [Nee Ntreh] to perpetrate a fraud * * * to get him admitted to the United States." *Id.* at 32a-34a.

The Board of Immigration Appeals (BIA) affirmed the IJ's decision ordering both petitioners deported. See note 1, *supra*. Agreeing with the IJ that

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38a), "there was no evidence adduced at [the perjury] trial to establish that the Abraham Nee Ntreh, identified in the reporter's record," was the same person as petitioner (*id.* at 45a).

petitioners' denials were not credible, the Board also agreed with his conclusion that "both respondents were aware at the time of their November 1989 consular interview that their marriage had been annulled several months earlier." BIA slip op. 12; see *id.* at 17. The Board also rejected (*id.* at 13-17) petitioners' argument that Texas would have recognized a "common-law marriage" between them at the time of the interview, pointing out both that petitioners based their representation that they were married on the 1988 ceremonial marriage, and that in any event they had not shown any of the three elements (agreement to marry, living together as husband and wife, and representing themselves as such to others) that would have been necessary to establish a "common-law" marriage under Texas law. The Board accordingly affirmed the IJ's judgment that both petitioners were deportable as aliens who procured their entry by fraud. *Id.* at 17.[3]

3. The court of appeals affirmed in May 1997. Pet. App. 1a-16a. Agreeing with decisions of two other courts of appeals, the court endorsed "the basic principle that changes in marital status undertaken after entry into the United States should not be used to manipulate immigration law," and it accordingly sustained the BIA's refusal "to relate back the order vacating [petitioners'] annulment to cure [the] misrepresentations" they knowingly made in connection with

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[3] The Board sustained petitioner Witter's challenge to the IJ's finding that she was deportable for aiding and abetting the illegal entry of an alien, noting that there was no evidence that she had done so "for gain," as required by the law applicable to her case. BIA slip op. 17-18. The Board declined to consider the marriage fraud charge against petitioner Nee Ntreh, which the IJ had not addressed and the INS had not pressed before the Board. *Id.* at 18.

their visa applications. *Id.* at 7a-8a. The court also rejected petitioners' "common-law marriage" argument, agreeing with the Board both that petitioners did not rely on any such marriage when they applied for entry, and that in any event no such marriage existed at that time under Texas law. *Id.* at 9a-10a. Holding further that the Board properly found petitioners' misrepresentations to have been willful (*id.* at 10a-11a); that petitioner Witter had waived any argument that she could not be deported for making misrepresentations that were material only to Ntreh's eligibility for entry (not her own) (*id.* at 11a-13a); that the IJ did not abuse his discretion by denying a continuance pending resolution of the perjury charges against Nee Ntreh (*id.* at 13a-15a); and that petitioners were not entitled to a remand for consideration of their eligibility for voluntary departure rather than deportation (*id.* at 15a-16a), the court affirmed the Board's decision "in all respects" (*id.* at 16a).

4. In October 1997, petitioners were deported to the United Kingdom. See Pet. App. 75a. After the Texas court of appeals reversed petitioner Nee Ntreh's perjury conviction (see note 2, *supra*), petitioners moved in the court of appeals "for recall of [the court's] mandate * * * and[/]or relief under" Rule 60(b) of the Federal Rules of Civil Procedure (*id.* at 48a). They argued that "but for the perjury charge, neither the [IJ] nor the [BIA] would have found [petitioners] deportable, and [the court of appeals] would not have affirmed the BIA's deportation order." *Id.* at 48a-79a (reprinting motion). The court of appeals denied petitioners' motion without further comment. *Id.* at 80a-81a.

ARGUMENT

1. Petitioners were deported from the United States in October 1997. Former Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c) (1994), which applies to this case, provides that "[a]n order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."[4] "Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity." *Stone* v. *INS*, 514 U.S. 386, 399 (1995). That point alone is sufficient to support the court of appeals' refusal to recall its previous mandate in this case, and to require that the present petition be denied or dismissed.[5]

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[4] Section 106(c) has been repealed, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(b), 110 Stat. 3009-612, but that change applies only to proceedings commenced on or after April 1, 1997, IIRIRA §§ 306(c)(1) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657) and 309(a), and the applicable transitional rule specifically provides that earlier deportation "proceedings (including judicial review thereof) shall continue to be conducted without regard to" the repeal. IIRIRA § 309(c)(1), 110 Stat. 3009-625 (as amended, 110 Stat. 3657); see also IIRIRA § 309(c)(4), 110 Stat. 3009-626 (as amended, 110 Stat. 3657) (transitional rules for cases in which final order is entered after Oct. 30, 1996); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 940 & n.5 (1999). The deportation proceedings against petitioners were commenced in 1993, see Pet. App. 3a, and the deportation orders became final when the BIA issued its decision in April 1996 (see note 1, *supra*).

[5] Some courts of appeals have asserted jurisdiction to review claims that an alien was deported without due process, at least if the claim is "colorable." See, *e.g.*, *Baez* v. *INS*, 41 F.3d 19, 22-25 (1st Cir. 1994) (discussing cases but rejecting any exception to statutory language), cert. denied, 515 U.S. 1158 (1995). In this

2. Even if the court of appeals would have had the authority to recall its mandate, its refusal to do so does not merit further review. As this Court has recently emphasized, a court of appeals' power to recall its mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998). It may be exercised "only in extraordinary circumstances." *Ibid.* There are no such circumstances here.[6]

Both the BIA (slip op. 12) and the court of appeals (Pet. App. 6a-8a, 10a-11a) rejected petitioners' claims on the basis of their own evaluation of the record before them, not in reliance on the State's independent decision to prosecute petitioner Nee Ntreh for perjury. The Immigration Judge, moreover, explicitly eschewed any reliance on the criminal case, noting that just as "an indictment is not evidence [of guilt]," so also "even a

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case, petitioners were deported only after their case had been reviewed by an Immigration Judge, the BIA, and the court of appeals, and after the time for seeking review in this Court had expired. They now contend that the court of appeals should have recalled its mandate and ordered their case reopened (Pet. 6-8), and that the IJ, the BIA, and the court of appeals violated the Tenth Amendment when they concluded that petitioners' relationship at the time of their 1989 visa application did not amount to a "common-law marriage" under Texas law (Pet. 8-11). Those contentions do not raise colorable constitutional claims.

[6] Petitioners misplace their reliance on Rule 60(b) of the Federal Rules of Civil Procedure (Pet. 6-8) in addition to (or in lieu of) the court of appeals' inherent power to recall its mandate. The Rules of Civil Procedure apply to proceedings in the district courts, not the courts of appeals. See Fed. R. Civ. P. 1. The cases cited by petitioners (Pet. 7-8) all deal with the application of Rule 60(b) in the district courts; none of them suggests that a court of appeals should proceed under that Rule to reopen one of its own final judgments in light of "newly discovered evidence" (Pet. 7).

verdict of not guilty in a criminal [perjury] case might not resolve disputes [over credibility for purposes of the deportation proceeding,] because of the difference between criminal and civil courts and the burden of proof." Pet. App. 29a; cf. *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (acquittal of criminal charges does not preclude judge from taking underlying conduct into account at sentencing under preponderance-of-the-evidence standard). There is accordingly no substance to petitioners' argument (Pet. 6) that their "new evidence"—reversal of Nee Ntreh's criminal conviction —"would have made a material difference in the original order appealed" to the court of appeals, and the court of appeals plainly did not abuse its discretion by denying petitioners' motion to recall its mandate. Compare *Calderon*, *supra*.

3. Petitioners' argument that the court of appeals violated the Constitution by refusing to recognize petitioners' asserted "common-law marriage" (Pet. 8-11) goes to the merits of a judgment that the court of appeals entered in 1997. Because petitioners did not seek review by this Court at that time, and because the court below has not recalled its mandate or reentered its judgment, the petition is jurisdictionally out of time with respect to the second question it seeks to present (see Pet. i). See 28 U.S.C. 2101(c); Sup. Ct. R. 13; *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90, 98-99 (1994).

In any event, the argument is meritless. The Immigration Judge, the BIA, and the court of appeals all analyzed the facts of this case under Texas law and concluded that, under state law, petitioners were not parties to a "common-law marriage" at the time of their

visa applications in 1989.[7] Pet. App. 9a-10a, 31a-32a; BIA slip op. 13-17. In the absence of a prior, dispositive state judgment to the contrary, that application of state law by federal administrators and the federal courts, in the course of resolving deportation issues indisputably within their respective jurisdictions, raises no question of conflict between federal and state authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1999

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[7] All three also correctly held that petitioners could not rely on the existence of such a marriage to avoid deportation when they had explicitly relied on their asserted (and then-annulled) *ceremonial* marriage, rather than on any "common-law" marriage, in applying for petitioner Nee Ntreh's visa. Pet. App. 9a, 31a; BIA slip op. 13. That holding provides an independent, federal-law basis for petitioners' deportation.